SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 392.

EDWIN DENBY, SECRETARY OF THE NAVY OF THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

GEORGE A. BERRY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

2 Supreme Court of the District of Columbia.

GEORGE A. BERRY, PLAINTIFF,
vs.
JOSEPHUS M. DANIELS, SECRETARY OF THE NAVY of the United States of America, defendant. } At Law, No. 63066.

UNITED STATES OF AMERICA, *District of Columbia.* } *ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition for mandamus.

(Filed November 18, 1919.)

In the Supreme Court of the District of Columbia.

The petitioner is a resident of District of Columbia, a citizen of the United States; the defendant is the Secretary of the Navy of the United States of America duly commissioned and acting as such.

3 2. Petitioner is an officer of the United States Naval Reserve Corps, to wit, lieutenant commander, class 3, duly commissioned and qualified as such; petitioner has sustained and now suffers physical disabilities incurred in line of duty as such officer which render him eligible for and entitled to retirement together with all the pay, privileges, and emoluments which pertain thereto.

The existence of such disability has been ascertained and established and found to exist by a board of medical survey of the Navy of the United States duly and lawfully constituted, and acting according to law; the said findings of the said board were duly announced and promulgated and reported to the commandant of the navy yard, Washington, D. C., the convening officer, for transmission to the Bureau of Medicine and Surgery; the commandant approved the said finding and report with his signature endorsed thereon and forwarded the same to the Bureau of Medicine and Surgery. Upon November 11, 1919, the Bureau of Medicine and Surgery transmitted the same to the Bureau of Navigation with its disapproval endorsed thereon solely for the reason and in the words "In accordance with the department's order of October 29, 1919, third paragraph, the bureau recommends that this officer be placed on inactive duty."

Said Bureau of Navigation acting under the orders and direction of the defendant as Secretary of the Navy, did on November 17, 1919, order that the plaintiff be discharged from active service in the

Navy; all of which is officially of record in the official records of the Navy Department of the United States.

The defendant, the Secretary of the Navy, did on October 29, 1919, issue and promulgate an order in words and figures as follows:

"1. Hereafter when any temporary officer not holding a permanent status in the U. S. Navy or U. S. Marine Corps or any officer in the Naval Reserve Force or Marine Corps Reserve is found physically disabled in line of duty by a report of a medical survey, such officer shall not hereafter be recommended to appear before a retiring board.

"2. When the officer is a temporary officer not holding a permanent status in the U. S. Navy or U. S. Marine Corps, and is found by a board of medical survey to be unfit for further service, the recommendation shall be that his appointment be revoked or that he be discharged.

"3. When the officer is an officer on the Naval Reserve Force or Marine Corps Reserve and is found by a board of medical survey to be unfit for further service he shall be placed on inactive duty.

"4. When action is taken in accordance with paragraphs 2 and 3, the officer concerned shall be informed in writing of the reason for the revocation of his appointment or discharge or for being placed on inactive duty as the case may be, and at the same time he shall be advised of his right to apply for compensation to the Bureau of War Risk Insurance in the Treasury Department and if com-
5 pensated by that bureau, of his right to apply to the Federal Board for Vocational Education for relief under the vocational rehabilitation act. The officer shall also be informed when the disability is in line of duty that pending adjudication of his claim for compensation by the Bureau of War Risk Insurance he may apply for or be retained for treatment in a naval hospital as a supernumerary patient."

In so far as the said order applies to the plaintiff it is illegal and against the acts of the Congress of the United States upon the subject; the plaintiff if discharged from active service in the Navy, or if placed on inactive duty, will not receive any compensation, pay, or emoluments subsequent to the date of such discharge, or of such placing on inactive duty; the plaintiff if placed upon the retired list of the Navy as he is entitled to be, will receive compensation, pay, and emoluments from the date of his retirement, all as provided by law.

The defendant, as Secretary of the Navy, will, unless prevented by the court, unlawfully and without authority or lawful power cause the said order and the said discharge aforesaid to be enforced against the plaintiff and will thus unlawfully accomplish his discharge from the Navy, and deny and deprive him of his right to retirement with pay. The plaintiff is by law and of right entitled to be retired with pay and that his name be placed upon the retired list of the United States Navy upon and after the 19 day of November, A. D.
6 1919, for his disability aforesaid, incurred in line of duty as

aforesaid, the facts thereof having been ascertained in manner aforesaid.

Plaintiff is advised and believes and therefore avers that the interpretation heretofore placed upon the act of Congress upon the subject by the defendant as Secretary of the Navy, and by the other officials of the United States having the subject for official discharge, has been that officers of the United States Naval Reserve Corps who have incurred physical disability in line of duty are entitled to be retired with pay and to have their names placed upon the retired list of the United States Navy.

The petitioner further avers that the Judge Advocate of the Navy, who according to law is the legal adviser of the Secretary of the Navy and of the Navy Department, has in writing informed and advised the defendant that officers of the United States Naval Reserve Force incurring disability in line of duty are entitled by law to be retired with pay and to have their names placed upon the retired list, and that the above-mentioned order of October 29th is "in my opinion contrary to law and will result in litigation against the United States which cannot successfully be defended." In the same official communication, the said Judge Advocate General further advised the defendant, the Secretary of the Navy, as follows:

"The laws relating to the retirement of temporary and Reserve officers do not prescribe what system shall be followed in ascer-
7 taining the fact that an officer is incapacitated in line of duty. Under the order you have issued this fact is to be ascertained and reported on by a board of medical survey, and the case is not to be referred to a retiring board. Reference to a retiring board is not necessary under the law; the report of a board of medical survey may sufficiently establish the facts necessary for retirement. No matter how the fact is established, when it has once been officially ascertained and made of record in the Navy Department that an officer of the temporary Navy or Reserve Force is disabled in line of duty his right to retirement under the law is fully established."

And further in the same communication officially advised the defendant, the Secretary of the Navy:

"The laws relating to officers of the temporary Navy and Naval Reserve Force and Marine Corps Reserve plainly confer upon those officers the same rights of retirement for physical disability in line of duty as are given by law to officers of the permanent Navy and Marine Corps. They have been so construed by the department and this construction has been acted upon in specific cases. When the officers who are deprived of their right to retirement under the above-mentioned order institute legal proceedings, as they naturally will, it will become the duty of this office on the part of the Navy Department and of the Attorney General as counsel for the Government in the courts, to defend the action required by said order. It
8 is my opinion, as above stated, that such action can not successfully be defended. I also consider that it would be advisable before taking action which the Attorney General will be required

to defend in the courts, and which is at least open to grave doubt from a legal standpoint, to obtain an advance opinion of the Attorney General upon the question whether or not such action may legally be taken."

Nevertheless and in spite of the information and advice so given him, the defendant as Secretary of the Navy, declines and refuses to revoke or rescind the aforesaid order of October 29th in its application to the plaintiff and other similarly situated, and proposes to, is about to, and will, unless otherwise required by the court, unlawfully accomplish the discharge of the plaintiff from the Navy instead of placing him upon the retired list, which he is by law required to do, and thus deprive him of his lawful right in the premises.

Wherefore the plaintiff prays that a rule may issue requiring the defendant on a day to be named by the court to show cause why a writ of mandamus should not be issued, requiring him forthwith to revoke the said order of October 29th and cancel the same; to revoke and cancel or cause to be revoked and cancelled the said order of discharge above mentioned, and requiring him as Secretary of the Navy to order the retirement of the plaintiff and to place or cause to be placed upon the retired list of the United States Navy
9 the name of the plaintiff with his present rank of lieutenant commander as, of, and from the 19 day of November, A. D. 1919, and that upon the final hearing of this cause the said rule be made absolute in all respects.

Plaintiff prays for all other relief which may be necessary or proper.

GEORGE A. BERRY.

DANIEL THEW WRIGHT,
FRANK S. SMITH,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

George A. Berry, being first duly sworn, says that he is plaintiff in the above-entitled cause, that the facts stated in the foregoing petition as of his own knowledge are true, and those stated upon information and belief he verily believes to be true.

GEORGE A. BERRY.

Sworn to before me and subscribed in my presence this 18th day of November, A. D. 1919.

[SEAL.] C. LARIMORE KEELEY,
Notary Public, D. C.

Rule to show cause.

(Filed November 18, 1919.)

In Supreme Court of District of Columbia.

Upon considering the petition in the above-entitled cause, it is this 18th day of November, A. D. 1919, ordered by the court that

the defendant therein named show cause before the undersigned, on or before the 11th day of December, A. D. 1919, why a
10 writ of mandamus should not issue as prayed in the petition.

A copy of this rule to be served upon the defendant on or before the 24th day of November, A. D. 1919.

F. L. SIDDONS,
Justice.

Marshal's return.

Served a copy of the within rule on Josephus M. Daniels, Secretary of the Navy of the U. S. A., personally. Nov. 18, 1919.

MAURICE SPLAIN,
U. S. Marshal.

K.

Order extending time within which to file answer.

(Filed December 11, 1919.)

In Supreme Court of District of Columbia.

On motion of the defendant, by his attorney, Morgan H. Beach, Esquire, and with the consent of Daniel Thew Wright, Esquire, attorney for the relator, the time within which the answer to the rule heretofore issued in this action is extended up to and inclusive of Friday, December nineteenth, A. D. 1919.

F. L. SIDDONS,
Justice.

I consent.

DAN. THEW WRIGHT,
Attorney for Relator.

11 *Amended petition for mandamus.*

(Filed February 27, 1920.)

In Supreme Court of District of Columbia.

1. The petitioner is a citizen of the United States, a resident of District of Columbia; the defendant is the Secretary of the Navy of the United States of America, duly commissioned and acting as such.

2. Petitioner is an "enrolled member of the United States Naval Reserve Force, holding the provisional rank and grade of lieutenant commander in the Naval Reserve, being class 3 of the United States Naval Reserve Force, and was such at all the times referred to in paragraph 4 of this petition; petitioner has sustained and now suffers physical disabilities incurred in line of duty as such officer which are permanent and which render him unfit for service in the Navy.

3. Said disabilities render him eligible for and entitled to retirement, together with all the pay, privileges, and emoluments which pertain thereto.

4. The existence of such disability has been ascertained and found to exist by a board of medical survey of the Navy Department of the United States duly and lawfully constituted and acting according to law; the said board further found that by reason of the said disabilities the petitioner was "unfit for service," that the probable future duration of such condition was "permanent," and said board in its said finding and report recommended as follows: "That he (petitioner) be ordered to appear before the U. S. Retiring
12 Board"; the said findings and recommendations of the said board were in writing duly announced, promulgated, and reported to the commandant of the navy yard, Washington, D. C., the convening officer of said board, and who had ordered said survey, for transmission to the Bureau of Medicine and Surgery; the said commandant duly approved the said findings and recommendation with his signature endorsed thereon and forwarded the same to the Bureau of Medicine and Surgery.

5. By reason of the foregoing and the laws applicable thereto the petitioner is entitled to be placed on the retired list of the Navy or of the Naval Reserve Force of the United States, or in the alternative petitioner is entitled to appear before a United States Naval Retiring Board for its action upon the subject of his retirement.

6. At the time of said survey the regulations in force (issued and adopted by the Secretary of the Navy with the approval of the President) provided for such a survey and report by a board of medical survey to the officer ordering the survey as the method of procedure required to be had before the appearance of petitioner before and the action of a retiring board upon the matter of his retirement.

7. According to the regulations in force at the time (issued and adopted by the Secretary of the Navy with the approval of the President), when a regular officer of the naval service of rank corresponding with the rank of petitioner was found and reported
13 by a board of medical survey as "suffering physical disability incurred in line of duty, present condition unfit for service, probable future duration permanent," and when recommended by said board "That he be ordered to appear before the U. S. Naval Retiring Board," it was the rule, custom, and regulation of the Navy Department that such officer be ordered as matter of course before a Naval Retiring Board for its action, in order that the matter of his retirement might duly and regularly come before the President for his action.

8. Under and according to the custom of the Navy Department and the regulations in force at the times referred to in paragraph 4 hereof, petitioner upon the findings and report of said board of medical survey referred to in paragraph 4 hereof would have been

ordered and permitted to appear before a Naval Retiring Board for its action, except for an order issued by the defendant on October 29, 1919.

9. The plaintiff if placed upon the retired list of the Navy will receive compensation, pay, and emoluments from the date of his retirement, all as provided by law, and of all of which he will be deprived unless he is retired.

10. Defendant as Secretary of the Navy has refused to permit the petitioner to appear before, and has prevented his appearance before, a Naval Retiring Board, and will continue so to do unless otherwise ordered by the court.

11. Defendant as Secretary of the Navy has prevented the petitioner from having the question of his eligibility for retire-
14 ment presented to or considered by a Naval Retiring Board, and will continue so to do unless otherwise ordered by the court.

12. Prior to and until the act of Congress of October 6th, 1917, creating "The Bureau of War Risk Insurance," the petitioner upon the existence of the disability, findings, reports, and recommendations set out in paragraph 4 hereof, was thereupon entitled to appear before a Naval Retiring Board; the defendant has refused to permit petitioner to appear before, and has prevented his appearance before, a Naval Retiring Board solely for the reason that in the judgment of defendant said act of October 6th, 1917, deprived petitioner of eligibility for retirement for physical disability incurred in line of duty, as shown by an official communication written to petitioner by defendant, a copy whereof is hereto attached marked "Exhibit B" and made part hereof.

13. The defendant as Secretary of the Navy has directed and caused and required the Bureau of Navigation of the Navy Department to issue to petitioner an order in part as follows:

"Having been found physically unfit for active duty in the U. S. Naval Reserve Force by the board of medical survey before which you appeared on October 14, 1919, the Secretary of the Navy has directed that you be ordered to your home and be released from all active duty."

14. The defendant, as Secretary of the Navy, will, unless
15 prevented by the court, cause the said order mentioned in paragraph 13 hereof to be enforced against the petitioner and will deny and deprive him of retirement and its advantages.

15. The petitioner is by law and of right entitled to be retired with pay and that his name be placed upon the retired list of the United States Navy upon and after the 14 day of November, A. D. 1919, for his disability aforesaid incurred in line of duty as aforesaid, the facts thereof having been ascertained in manner aforesaid, or in the alternative, is entitled to appear before a Naval Retiring Board, for its action in the premises.

16. Petitioner is advised and believes and avers that prior to and until October 29, 1919, the interpretation placed upon the acts of Congress and regulations of the Navy Department upon the subject of retirement, by the Navy Department of the United States and by the officials thereof having the subject for official discharge, was that officers of the United States Naval Reserve Corps who had incurred physical disability in the line of duty were entitled to appear before a Naval Retiring Board, upon a finding and report of a board of medical survey of the existence of such disability and that its probable duration was permanent, and upon the recommendation of a board of medical survey that he be "ordered to appear before U. S. Naval Retiring Board"; and the said acts and regulations which were by the defendant and the Navy Department up to said date given that effect and operation, are still in full force.

16 17. Plaintiff is advised and believes and therefore avers that prior to and until October 29, 1919, the interpretation theretofore placed upon the acts of Congress upon the subject of retirement by the Navy Department of the United States, and by the officials thereof having the subject for official discharge, was that officers of the United States Naval Reserve Corps who had incurred physical disability in the line of duty were eligible to be retired with pay and eligible to have their names placed upon the retired list of the United States Navy.

18. The petitioner further avers that the Judge Advocate of the Navy, who according to law is the legal adviser of the Secretary of the Navy and of the Navy Department, has in writing informed and advised the defendant that officers of the United States Naval Reserve Force incurring disability in line of duty are entitled by law to be retired with pay and to have their names placed upon the retired list, and further, that the above-mentioned order of October 29th is, as he says, "in my opinion contrary to law and will result in litigation against the United States which cannot successfully be defended."

19. In the same official communication the said Judge Advocate General further advised the defendant, the Secretary of the Navy, as follows:

"The laws relating to the retirement of temporary and Reserve officers do not prescribe what system shall be followed in ascertaining the fact that an officer is incapacitated in line of duty.

17 Under the order you have issued this fact is to be ascertained and reported on by a board of medical survey, and the case is not to be referred to a retiring board. Reference to a retiring board is not necessary under the law; the report of a board of medical survey may sufficiently establish the facts necessary for retirement. No matter how the fact is established, when it has once been officially ascertained and made of record in the Navy Department that an officer of the temporary Navy or Reserve Force is disabled in line of duty his right to retirement under the law is fully established."

And further, in the same communication, officially advised the defendant, the Secretary of the Navy:

"The laws relating to officers of the temporary Navy and Naval Reserve Force and Marine Corps Reserve plainly confer upon those officers the same rights of retirement for physical disability in line of duty as are given by law to officers of the permanent Navy and Marine Corps. They have been so construed by the department, and this construction has been acted upon in specific cases. When the officers who are deprived of their right to retirement under the above-mentioned order institute legal proceedings, as they naturally will, it will become the duty of this office on the part of the Navy Department and of the Attorney General as counsel for the Government in the courts, to defend the action required by said order. It is my opinion as above stated that such action can not successfully be defended. I also consider that it would be advisable before
18 taking action which the Attorney General will be required to defend in the courts, and which is at least open to grave doubt from a legal standpoint, to obtain an advance opinion of the Attorney General upon the question whether or not such action may legally be taken."

20. Nevertheless and in spite of the said regulations and the construction, information, and advices aforesaid, the defendant as Secretary of the Navy has prevented the appearance before a Naval Retiring Board of petitioner and certain other officers of the Naval Reserve Force similarly disabled, and who have by lawful boards of medical survey been surveyed and recommended to be ordered before a Naval Retiring Board, and proposes and will continue so to do, unless otherwise required by the court.

21. Yet nevertheless since October 6th, 1917, still other officers of the Naval Reserve Force, situated alike with petitioner, have, under the regulations and acts of Congress, for physical disability incurred in line of duty, been by the defendant ordered and permitted to appear before naval retiring boards, and have been retired with the pay and advantages thereof for such disability.

Wherefore petitioner prays that a summons issue requiring defendant to answer this petition, specifically and paragraph by paragraph as required by the rules.

Petitioner further prays that a rule may issue requiring the
19 defendant to show cause on a day named, why a writ of mandamus should not issue, requiring and commanding as follows:

1. That the defendant forthwith permit the petitioner to appear before a Naval Retiring Board for its action upon the subject of his retirement for physical disability incurred in line of duty.

2. That the defendant revoke and cancel the order referred to in paragraph 13 hereof.

3. Or in the alternative, that the defendant forthwith transmit to the President for his action, the name of the petitioner as eligible for retirement for physical disability incurred in line of duty.

4. And that upon final hearing said rule be made absolute.

Petitioner prays for all other and further relief that may be necessary or proper in the premises.

GEORGE A. BERRY.

DANIEL THEW WRIGHT,
PHILIP ERSHLER,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

George A. Berry, being first duly sworn, says that he is the petitioner named in the foregoing amended petition for mandamus; that he has read the petition; and that the facts therein stated upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

GEORGE A. BERRY.

Sworn to before me and subscribed in my presence this 25th day of February, A. D. 1920.

[SEAL.]

C. LARIMORE KEELEY,
Notary Public, D. C.

20 *Exhibit B to amended petition.*

"NOVEMBER 15, 1919

"From: Secretary of the Navy.
"To: Lieutenant Commander George A. Berry, U. S. N. R. F., U. S. Naval Hospital, Washington, D. C.
"Subject: Retirement.
"Reference: (a) Your letter of November 6, 1919.

"1. Department acknowledges receipt of your letter of November 6, 1919, requesting retirement.

"2. The act of August 29th, 1916, establishing the Naval Reserve Force, provided for the retirement of Reserve officers incapacitated by reason of physical disability incurred in the line of duty, in that enrolled members of the Naval Reserve Force shall be subject to the laws, regulations, and orders for the government of the Regular Navy during such time as they may be required to serve on active service. Later Congress created the War Risk Bureau for the purpose of providing compensation for members of the Military and Naval Establishments who may be injured in the performance of their military duties, or physically incapacitated as a result of such service. In my opinion it was clearly the intent of Congress that all members of the temporary and Reserve Establishments who are found physically disabled in the line of duty by a medical survey should apply for compensation to the Bureau of War Risk Insurance, in the Treasury Department, and if compensated by that
21 bureau, may apply to the Federal Board for Vocational Education for relief under the vocational rehabilitation act. Although not technically done, I am of the opinion that the act creating the War Risk Bureau abrogated the provisions of the act of

August 29th, 1916, creating the Naval Reserve Force which served temporarily with the Navy during the war.

"3. In view of the above it will be impracticable to place you on the retired list and it will be necessary for you to apply to the War Risk Insurance Bureau for such compensation as may be due you.

(Signed) "JOSEPHUS M. DANIELS."

Rule to show cause.

(Filed March 2, 1920.)

In Supreme Court of District of Columbia.

Upon consideration of the amended petition herein filed, it is this 2nd day of March, A. D. 1920:

Ordered, that the defendant show cause on or before the 11th day of March, A. D. 1920, why a writ of mandamus should not issue commanding and requiring him forthwith to—

1. Permit the petitioner to appear before a Naval Retiring Board for its action upon the subject of his retirement for physical disability incurred in line of duty.

2. Revoke and cancel the order referred to in paragraph 13 of the amended petition.

22 3. Or in the alternative, commanding and requiring him forthwith to transmit to the President for his action, the name of the petitioner as eligible for retirement for physical disability incurred in line of duty.

F. L. SIDDONS,
Justice.

Memorandum.

In Supreme Court of District of Columbia.

MARCH 12, 1921.

Time to file answer to rule to show cause extended to and including March 17, 1920.

Answer to amended petition and rule to show cause.

In Supreme Court of District of Columbia.

(Filed March 17, 1920.)

Josephus Daniels, Secretary of the Navy, now, and at all times, saving and reserving unto himself all exceptions, imperfections, uncertainties and defects in the petition for a writ of mandamus, filed herein and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition,

to grant the relief prayed for, and the lack of jurisdiction of this court to direct him, as Secretary of the Navy, to perform any act involving the exercise of his judgment and discretion in matters within his jurisdiction, or to the lack of status of the petitioner to seek or obtain the relief sought in said petition, and relying on the same, as if demurrer had been specifically interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, answering, says:

23 I.

He admits that the petitioner is a citizen of the United States and a resident of the District of Columbia; and that the defendant is the Secretary of the Navy of the United States of America duly commissioned and acting as such; but states that the name of the defendant is Josephus Daniels and not Josephus M. Daniels as named in the title of this case.

II.

He admits that the petitioner is an enrolled member of the United States Naval Reserve Force, holding the provisional rank and grade of lieutenant commander in the Naval Auxiliary Reserve, being class three of the United States Naval Reserve Force, and was such at all the times referred to in paragraph four of the petition. He admits that petitioner has sustained physical disabilities, but has no knowledge that the petitioner now suffers such physical disabilities, and states that the evidence of record in the Navy Department is not sufficient to satisfy him, as Secretary of the Navy, and he accordingly denies, that the aforesaid physical disabilities were incurred by the petitioner in line of duty as such member of the United States Naval Reserve Force, are permanent, and render the petitioner unfit for service in the Navy, the evidence aforesaid being as follows, viz:

At the time of his enrollment in the United States Naval Reserve Force, the petitioner was in receipt of a pension from the
24 United States, under certificate numbered 1,035,330, Department of the Interior, Bureau of Pensions, based on service of such petitioner as private, Company "F," 4th U. S. Infantry, War with Spain.

At the time this petitioner was examined for enrollment in the United States Naval Reserve Force he was rejected for disabilities then existing, as reported by the examining surgeons, viz, "defective teeth and growth under tongue," which said disabilities were waived upon recommendation of the examining surgeon and of the Surgeon General of the Navy.

This petitioner was examined by a board of medical survey at the naval hospital, Norfolk, Virginia, March 11, 1919, which said board reported said petitioner "unfit for duty," probable future duration, "indefinite," and recommended "that he be transferred to the U. S. naval hospital, Washington, D. C., in charge of two attendants."

The said board of medical survey further stated in its report that the origin of the aforesaid unfitness of this petitioner was "in the line of duty," and "not the result of his own misconduct," but qualified said report by stating that "the origin is not entirely clear, but may be due to exposure as above noted. Patient admits, however, that he is a moderate user of alcohol. He denies syphilis, but a spinal fluid gives a 2 plus noguchi reaction."

This petitioner was again examined by a board of medical survey, viz, on June 11, 1919, at the U. S. naval hospital, Washington,
25 D. C., which said board reported said petitioner, who had been under treatment at said hospital for eighty-nine days, "unfit for duty," probable future duration, "indefinite," and recommended "that he be granted ninety days sick leave." The said board of medical survey further stated in its report that the origin of the aforesaid unfitness of this petitioner was "in the line of duty," and "not the result of his own misconduct," and that the "Facts are as follows: Incident to stress of service. Upon admission to this hospital patient had complete paralysis of the lower limbs. He has shown marked improvement and is now able to walk without the aid of crutches. He is not in need of hospital treatment at this time and sick leave would be of great benefit to him."

This petitioner was again examined by a board of medical survey, viz, on October 14, 1919, at the U. S. naval hospital, Washington, D. C., after sick leave granted him pursuant to the recommendation of the board of survey previously held as above set forth, and was found and reported by the said board of October 14, 1919, "unfit for service," probable future duration "permanent," with recommendation "that he be ordered to appear before the U. S. Naval Retiring Board." The said board of medical survey, last held, further stated in its report that the origin of the unfitness of this petitioner was "in the line of duty," and "not the result of his own misconduct," and that the "Facts are as follows: Incident to service conditions. Not due to his own misconduct. At the time of
26 his admission examination showed a complete paraplegia. This condition has steadily improved under massage and re-educational treatment until he has regained all normal movements. There remains, however, a definite amount of weakness, a loss of knee jerk in the right side, and it is felt that it would be unsafe to return this officer to duty because of the likelihood of the condition returning under strenuous exercise."

This petitioner addressed a letter to the Surgeon General of the Navy under date of October 1, 1919, in which he stated that "now, with the exception of poor circulation and pains in the back, I am practically, to all extents so far as can be observed, normal"; and the petitioner further stated in the same letter: "My recovery is considered by the profession, and the laiety with whom I have discussed my case, as nothing short of remarkable, and I feel that I owe my life to the untiring efforts principally of Dr. Dallas B. Sutton,

whose wonderful knowledge of his profession enabled him to make an accurate diagnosis at that stage of my condition when, as I have before stated, such was so essentially necessary."

III.

Answering paragraph three of the petition, this defendant denies that the physical disabilities of the petitioner, if such now exist and even if incurred in the line of duty as a member of the United States Naval Reserve Force, render the petitioner eligible for and entitled to retirement, together with all the pay, privileges, and
27 emoluments which pertain thereto, and avers that, if the law authorizes the retirement of members of the United States Naval Reserve Force in any case for physical disabilities incurred in line of duty, the question whether or not such physical disabilities were so incurred in line of duty and are such as might render such members eligible for retirement is one which can only be ascertained and determined after proceedings had before a Naval Retiring Board, constituted and proceeding in accordance with the Revised Statutes of the United States, sections 1448, 1449, 1450, and 1451; that such Naval Retiring Board could have no jurisdiction in any case unless and until the Secretary of the Navy by direction of the President, in accordance with section 1448 of the Revised Statutes of the United States, should refer the cases of such members, individually, to such Naval Retiring Board; and that the determination of such facts by a Naval Retiring Board so constituted and proceeding and acquiring jurisdiction in accordance with the aforesaid sections of the Revised Statutes could not render such members of the United States Naval Reserve Force eligible for and entitled to retirement unless and until the findings and decisions of such retiring board in each case had been submitted to and approved by the President of the United States in accordance with the Revised Statutes of the United States, sections 1452 and 1453. And this defendant avers that the existence of the physical disabilities in the case of this petitioner and the questions whether or not such disabilities, if they exist, were
28 incurred by him in line of duty and are such as to render him eligible for retirement have not been inquired into or determined by a Naval Retiring Board as aforesaid, that the President of the United States has not, in his discretion, directed the Secretary of the Navy to refer the case of this petitioner to such Naval Retiring Board, and therefore the findings and decision of a Naval Retiring Board in this case have not been submitted to and approved by the President of the United States in the manner provided by the aforesaid sections of the Revised Statutes of the United States.

IV.

Answering paragraph four of the petition, this defendant admits that the existence of disability in the case of this petitioner was ascertained and found to exist by a board of medical survey of the

Navy Department of the United States duly and lawfully constituted and acting according to law, to wit, in accordance with regulations issued by the Secretary of the Navy with the approval of the President as provided by section 1547 of the Revised Statutes of the United States, but states that such findings of said board of medical survey was made on October 14, 1919, and does not establish the existence of disability at this time, and furthermore states that the report of said board of medical survey, as more fully set forth in paragraph two of this answer, was on its face and in terms speculative and based upon the "likelihood of the condition returning under strenuous exercise," rather than upon the existence of
39 definite disability at the time of said report by said board of medical survey.

Answering further paragraph four of said petition, this defendant admits that the said board further found that by reason of the said disabilities, the petitioner was in its opinion "unfit for service," that the probable future duration of such condition was in its opinion "permanent," and that said board in its said finding and report recommended as follows: "That he (petitioner) be ordered to appear before the U. S. Naval Retiring Board"; that the said findings and recommendations of the said board were in writing duly announced, promulgated, and reported to the commandant of the Navy Yard, Washington, D. C., the convening officer of said board, and the officer who had ordered said survey, for transmission to the Bureau of Medicine and Surgery; that the said commandant duly approved the said findings and recommendations with his signature endorsed thereon and forwarded the same to the Bureau of Medicine and Surgery. But this defendant avers that the said recommendation of said board was disapproved by the said Bureau of Medicine and Surgery, November 11, 1919, over the signature of the acting chief of said bureau, and that the said recommendation of said board was in terms and personally disapproved by this defendant, over his signature as Secretary of the Navy, on November 12, 1919; and this defendant further states that he has the authority, power, and duty, in the exercise of his discretion as Secretary of the Navy, to
30 disapprove the findings and recommendations of boards of medical survey in any case and that the findings and recommendations of such boards are nullified and rendered invalid when so disapproved by him as Secretary of the Navy.

V.

This defendant denies that by reason of the foregoing and the laws applicable thereto, the petitioner is entitled to be placed on the retired list of the Navy or of the Naval Reserve Force of the United States, and states that the board of medical survey referred to in paragraph four of the petition and of this answer thereto was constituted and proceeded in accordance with the regulations for the

Government of the Navy of the United States, viz, articles 361 to 366 of the Navy Regulations, 1913, and not in accordance with any statute of the United States, and that such boards of medical survey are an instrumentality of the Navy Department, created by Executive regulations and limited thereby as to its functions and duties, not empowered to compel the attendance of witnesses, to take testimony under oath, or to conduct a thorough and final examination in order to determine the existence and origin of physical disability, or to ascertain and establish whether or not any person is suffering from disability for which he might lawfully be retired and to recommend the retirement of such person, but are merely authorized to conduct a preliminary investigation of an informal nature, consisting principally if not entirely of a medical
31 examination of the patient, in conducting which such board frequently does not have the facilities for making a thorough and complete examination of the patient, consideration of his own unsworn statements and of such part of his official medical history as might be available to it, and to recommend that the patient, if deemed by it to be suffering from disability which it believed to be permanent, be ordered before a Naval Retiring Board for further examination and proceedings in accordance with the Statutes of the United States. And this defendant further states that the findings and recommendations of the aforesaid board of medical survey, even if approved by him as Secretary of the Navy, would not entitle this petitioner to be placed on the retired list of the Navy or Naval Reserve Force of the United States, and that under the law no persons may be placed on the retired list of the Navy or Naval Reserve Force of the United States, except in the discretion and by the order of the President of the United States, notwithstanding that they may be suffering from physical disability incurred in the line of duty and of permanent duration.

Answering further paragraph five of this petition, the defendant denies that this petitioner is entitled to appear before a United States Naval Retiring Board, for its action upon the subject of his retirement, and states that, even if the law authorizes the retirement of members of the United States Naval Reserve Force for physical disability incurred in line of duty and confers upon such members all the benefits and privileges of retirement enjoyed by officers
32 of the Regular Navy of the United States, it would be necessary before such members could become entitled to appear before such board that the Secretary of the Navy by the direction of the President of the United States refer the cases of such members to a Naval Retiring Board, in conformity with section 1448 of the Revised Statutes of the United States, and the defendant further states that the President has not directed him, as Secretary of the Navy, to refer the case of this petitioner to a Naval Retiring Board, and that the case of this petitioner has not been referred to such board by the Secretary of the Navy.

VI.

This defendant denies that at the time of the survey referred to in paragraph four of the petition and of this answer thereto the regulations in force (issued and adopted by the Secretary of the Navy with the approval of the President) provided for such a survey and report by a board of medical survey to the officer ordering the survey, as the method of procedure required to be had before the appearance of petitioner before and the action of a retiring board upon the matter of his retirement.

VII.

This defendant denies that according to the regulations (issued and adopted by the Secretary of the Navy with the approval of the President) in force at the time of the aforesaid report of the board of medical survey in the case of this petitioner, when a regu-
33 lar officer of the naval service of rank corresponding with the rank of petitioner was found and reported by a board of medical survey as "suffering physical disability incurred in line of duty, present condition unfit for service, probable future duration permanent" and when recommended by said board "That he be ordered to appear before the U. S. Naval Retiring Board," it was the rule, custom, and regulation of the Navy Department that such officer be ordered as matter of course before a Naval Retiring Board for its action, in order that the matter of his retirement might duly and regularly come before the President for his action; and this defendant states that according to the aforesaid regulations then in force it was the rule, custom, and regulation of the Navy Department that a report of a board of medical survey as aforesaid in the case of an officer of the regular Navy as aforesaid should be acted on by the officer ordering said survey and transmitted by such officer direct to the Bureau of Medicine and Surgery for recommendation and further transmission to the Bureau of Navigation for final action, and that according to the rule, custom, and regulation of the Navy Department such officer was not ordered before a Naval Retiring Board unless the recommendation of the board of medical survey as aforesaid was approved by the Bureau of Medicine and Surgery, and concurred in by the Secretary of the Navy, and the order to such officer to appear before a Naval Retiring Board was issued by
34 the Secretary of the Navy, in writing over his official signature and expressly stated therein to be "By direction of the President," in conformity with section 1448 of the Revised Statutes of the United States.

VIII.

This defendant denies that according to the custom of the Navy Department and the regulations in force at the times referred to in paragraph four of the petition, petitioner upon the findings and re-

port of said board of medical survey referred to in paragraph four of the petition would have been ordered and permitted to appear before a Naval Retiring Board for its action, except for an order issued by the defendant on October 29, 1919, and states that action in the case of this petitioner was taken in accordance with an order issued by this defendant, over his official signature as Secretary of the Navy, under date of November 12, 1919, addressed to the Chief of the Bureau of Navigation, forwarding to the latter official the report of the board of medical survey aforesaid, and stating: "The recommendation of the board of medical survey in this case is not approved. In accordance with the recommendation of the Surgeon General, as set forth in the third endorsement, it is directed that this officer be ordered to proceed to his home and be released from active duty."

IX.

This defendant states that the question of what compensa-
35 tion, pay, and emoluments, if any, the petitioner or any member of the Naval Reserve Force will be entitled to receive if placed upon the retired list of the Navy for physical disability is one which this defendant is advised and believes and accordingly avers has never been adjudicated by any court of competent jurisdiction, and is a question which, in so far as the executive branch of the Government is concerned, is under the jurisdiction of the Comptroller of the Treasury, and this defendant is advised and believes and accordingly avers that such question has never been decided by the Comptroller of the Treasury, and this defendant accordingly says that he has no information as to what compensation, pay, and emoluments, if any, the petitioner will be entitled to receive if placed upon the retired list of the Navy.

X.

This defendant admits that as Secretary of the Navy he has refused to permit the petitioner to appear before, and has prevented his appearance before a Naval Retiring Board, and avers that he has not been directed by the President to refer the case of this petitioner to such Naval Retiring Board; and this defendant respectfully states that this honorable court is without jurisdiction to order him, as Secretary of the Navy, to refer the case of this petitioner to such Naval Retiring Board, and further says that even if the retirement of members of the Naval Reserve Force for physical disability is authorized by law, a Naval Retiring Board would be without ju-
36 risdiction to consider and determine the case of this petitioner if referred to it by the Secretary of the Navy by order of this honorable court and that for such Naval Retiring Board to acquire jurisdiction in the case of this petitioner it would be necessary that such case be referred to it by the Secretary of the Navy by direction of the President and at the discretion of the President, in

accordance with section 1448 of the Revised Statutes of the United States.

XI.

Defendant admits that as Secretary of the Navy he has prevented the petitioner from having the question of his eligibility for retirement presented to or considered by a Naval Retiring Board, but avers that he has not been directed by the President to refer the case of this petitioner to such Naval Retiring Board and that he has not prevented the petitioner from appealing to the President to direct this defendant as Secretary of the Navy to refer the case of this petitioner to such Naval Retiring Board; and this defendant further states that under the provisions of regulations issued by him as Secretary of the Navy pursuant to law, to wit, section 161 of the Revised Statutes of the United States, it is the right of this petitioner to appeal to the President as the common superior from any order or decision of the Secretary of the Navy, and to forward such appeal to the President through the Navy Department, or to address such appeal directly to the President in case of refusal or failure of the
37 Navy Department to forward same; and this defendant further states that he has not refused or failed to forward to the President any such appeal from this petitioner and that he has not received any such appeal to be forwarded to the President; and this defendant further states that if directed by the President to refer the case of this petitioner to a Naval Retiring Board he will, as Secretary of the Navy, obey such direction of the President; and this defendant respectfully states that this honorable court is without jurisdiction to order him, as Secretary of the Navy, to refer the case of this petitioner to such Naval Retiring Board.

XII.

This defendant denies that prior to and until the act of Congress of October 6th, 1917, creating "The Bureau of War Risk Insurance," the petitioner, upon the existence of the disability, findings, reports, and recommendations set out in paragraph 4 of the petition, was thereupon entitled to appear before a Naval Retiring Board. He admits that he has refused to permit petitioner to appear before, and has prevented his appearance before a Naval Retiring Board, but denies that such action of the defendant was solely for the reason that in the judgment of defendant said act of October 6th, 1917, deprived petitioner of eligibility for retirement for physical disability incurred in line of duty, although he admits signing an official communication addressed to petitioner by defendant, a substantially correct copy whereof is appended to the petition
38 marked "Exhibit B" and made part thereof, and this defendant says that the facts and circumstances under which such action was taken and the reasons therefor were as follows, viz:

The United States Naval Reserve Force was created by an act of Congress approved August 29, 1916, entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes" (39 Statutes at Large 556, 587), which said act of Congress provided, in part, that—

"All members of the Naval Reserve Force shall, when actively employed as set forth in this act, be entitled to the same pay, allowances, gratuities, and other emoluments as officers and enlisted men of the naval service on active duty of corresponding rank or rating and of the same length of service. When not actively employed in the Navy, members of the Naval Reserve Force shall not be entitled to any pay, bounty, gratuity, or pension except as expressly provided for members of the Naval Reserve Force by the provisions of this act."

The Judge Advocate General of the Navy, in an official opinion dated May 20, 1918, held that retirement with pay for physical disability was not expressly provided for by said act of August 29, 1916, relating to the Naval Reserve Force, that no retired list was authorized for officers of said Reserve Force and that there was
39 no law authorizing the President to place such officers on the retired list of the Navy, which said opinion was accepted and the substance thereof published by this defendant as Secretary of the Navy in an official publication entitled Court-Martial Order No. 50, 1918, dated 31 May, 1918, and no members of the Naval Reserve Force were in fact retired for physical disability under the provisions of said act of August 29, 1916, either before or after the act of October 6, 1917, referred to in paragraph 12 of the petition.

On July 1, 1918, the President approved an act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and nineteen, and for other purposes" (40 Statutes at Large 704, 710), which said act provided in part "that no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty." And this defendant states that the act of Congress last cited made no affirmative provision for the retirement of members of the Naval Reserve Force on account of physical disability incurred in line of duty, did not provide what procedure should be followed in ascertaining and determining whether or not any member of the Naval Reserve Force was suffering from physical disability incurred in line of duty, did not provide what rank should be given members of the Naval Reserve Force if retired for physical disability incurred in line of duty, did not provide what rates of pay, if any, should be received by members of the Naval Reserve Force if retired
40 for physical disability incurred in line of duty, but was negative legislation, conferring no affirmative right or eligibility for retirement upon members of the Naval Reserve Force for physical disability incurred in line of duty.

After the enactment of the law last cited the Judge Advocate General rendered an official opinion holding that said law "indicates an intention on the part of Congress to extend the privilege of retirement for physical disability incurred in the line of duty, which is enjoyed by the officers of the regular Navy, to those members of the Naval Reserve Force in like situations and while they are in the active service of the United States," and that "the retirement for physical disability of an officer of the Naval Reserve Force will not change his status to that of an officer of the regular Navy, as such a change in office could be accomplished only by the exercise of the appointing power," but that an officer of the Naval Reserve Force so retired for physical disability incurred in line of duty "will continue to be a member of the Naval Reserve Force, although on the retired list thereof and entitled to the same benefits as though he were an officer on the retired list of the regular Navy," which said opinion of the Judge Advocate General was accepted and the substance thereof published by this defendant as Secretary of the Navy in an official publication entitled "Court-Martial Order No. 141, 1918," dated 31 October, 1918. And this defendant further states that pursuant to the law as construed by the Judge
41 Advocate General certain members, approximately ten in number, of the United States Naval Reserve Force, and one member of the United States Marine Corps Reserve, were, in fact, placed on the retired list for physical disability incurred in line of duty, such action being taken in each case upon the written order of the President over his personal signature as such, which said order of the President in each case was upon the record of proceedings of a retiring board convened in accordance with the Revised Statutes of the United States, before which retiring board the member of the Naval Reserve Force so retired had been ordered and permitted to appear by the Secretary of the Navy, as evidenced by an official communication addressed to such member over the signature of the Secretary of the Navy, and expressly stated therein to be "By direction of the President," all in accordance with section 1448, of the Revised Statutes of the United States; and this defendant states that no member of the Naval Reserve Force or Marine Corps Reserve was transferred to the retired list at any time except pursuant to the written order of the President in each case, as aforesaid, which said orders were issued by the President under date of 5 June, 1919, 31 July, 1919, 2 August, 1919, and 29 September, 1919, and each of which said orders stated that it was "in conformity with the provisions of sections 1453 of the Revised Statutes, and those of the act of July 1, 1918."

On October 27, 1919, a written memorandum was furnished the defendant, as Secretary of the Navy, by the Chief of the
42 Bureau of Medicine and Surgery of the Navy Department, which said memorandum was stated therein to have particular reference to the case of this petitioner, and in which said memorandum it was stated in part:

"In view of the large number of temporary and reserve officers who are being surveyed for physical disability rendering them unfit for the service, either wholely or in part, and to the fact that owing to the necessity of demobilization of such officers hasty judgment without due observation must be made, it would appear desirable to recommend that such officers be disenrolled or their appointments be revoked, as the case may be, with a view to placing them in a status (discharge or resignation) wherein they can apply for compensation under the war risk act.

"The war risk act provides for compensation for death or disability resulting from personal injury suffered or disease contracted in line of duty by any commissioned officer or enlisted man or nurse when employed in active service. Provision is also made in this act for degrees of disability up to an including total disability and for additional compensation if the individual has a wife, children, or a widowed mother dependent upon him. Provision is also made for the furnishing of such reasonable medical, surgical, and hospital services and supplies as may be necessary. Provision is also made for compensation to widow or dependent widowed
43 mother or dependent child in case of death resulting from injury or disease contracted in the line of duty.

"The vocational rehabilitation act administered by the Federal Board for Vocational Education provides for a course of vocational rehabilitation for individuals, receiving compensation for physical disability, who elect to follow such a course. Individuals electing to follow such a course are entitled to receive monthly compensation equal to the amount of their monthly pay for the last month of their active service or equal to the amount received by them as compensation and if an enlisted man, his family receives the compulsory allotment and family allowance in accordance with the terms of the war risk act. This act also provides for the payment of the expenses of travel, lodging, subsistence and other necessary expenses of persons following the prescribed courses.

"Under the war risk act, section 312, it appears that compensation shall not be paid while the person is in receipt of service or retirement pay and that the laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable to persons now in (October 6, 1917) or hereafter entering the service. The right of officers of the regular service to retirement for physical disability does not seem to have been touched upon or repealed by the war risk act. It is, therefore, considered that the intent of Congress was to provide for all commissioned officers
44 of the temporary and reserve Navy and Marine Corps, nurses, and for all enlisted men of the regular, temporary, and reserve Navy and Marine Corps, in the war risk act a substitute for previously authorized gratuities or pensions.

"Should officers be disenrolled or appointments be revoked they could be informed of their right to apply for compensation to the

Bureau of War Risk Insurance in the Treasury Department, and that if they so elect they would be continued as a supernumerary in a naval hospital while their application is being adjudicated by the Bureau of War Risk Insurance."

At or about the date of the memorandum last above quoted, the attention of this defendant, as Secretary of the Navy, was directed to the fact that under the law officers of the Army occupying a status corresponding to the status of this petitioner were not eligible for retirement and were not in fact retired even for serious physical disabilities incurred in actual battle with the enemy in Europe, and that the retirement of members of the Naval Reserve Force for physical disability, particularly in cases where such disability was not incurred in action againt the enemy, was a discrimination against such members of the Army and in favor of the members of the Naval Reserve Force which this defendant, as Secretary of the Navy, considered unwarranted and not required by the legislation enacted by Congress: and this defendant was further advised that under the circumstances stated officers of the Army so disabled in action
45 with the enemy were compensated therefor under the laws creating the Bureau of War Risk Insurance and the Federal Board for Vocational Education, referred to in the memorandum hereinbefore quoted from the Bureau of Medicine and Surgery, and this defendant as Secretary of the Navy was advised that if members of the Naval Reserve Force were not retired for disability in line of duty they would have the same right to compensation under the laws last mentioned as was enjoyed by officers of the Army in a corresponding status who were disabled in action; and this defendant believed that in the absence of contrary directions issued to him by the President, it was not incumbent upon him and he was not required by law to take any action in furtherance of the retirement of this petitioner for disability alleged to have been incurred in line of duty, whether or not the law permitted such retirement, at the discretion of the President, after investigation and determination of the facts by a Naval Retiring Board; and this defendant states that he has not been directed by the President to refer the case of this petitioner to a Naval Retiring Board.

XIII.

The defendant admits that as Secretary of the Navy he has directed and caused and required the Bureau of Navigation of the Navy Department to issue to petitioner an order in part as follows:

"Having been found physically unfit for active duty in the U. S. Naval Reserve Force by the board of medical survey before
46 which you appeared on October 14th, 1919, the Secretary of the Navy has directed that you be ordered to your home and be released from all active duty."

And this defendant states that said order issued by the Bureau of Navigation was dated November 14th, 1919, and was issued pursuant

to the order of this defendant to said Bureau of Navigation dated November 12, 1919, and quoted in paragraph eight of this answer.

Defendant further states that the Bureau of Navigation, pursuant to his aforesaid order of November 12, 1919, issued to the petitioner an order, dated November 1, 1919, in part as follows:

"You are hereby detached from such duty as may have been assigned you; will proceed to your home and regard yourself honorably discharged from active service in the Navy."

XIV.

This defendant is advised and believes and accordingly avers that said order mentioned in paragraph 13 of the petition has already been enforced against the petitioner, and states that if such is not the case he admits that he will, unless prevented by the court, cause the said order to be enforced against the petitioner, and he respectfully states that this honorable court is without jurisdiction to prevent him, as Secretary of the Navy, from enforcing said order, issued by him in the exercise of his discretion and in the discharge
47 of his duties under the law in the course of and as an incident to the demobilization of the Naval Reserve Force.

Answering further paragraph fourteen of the petition, this defendant states that the averment therein that the defendant will, unless prevented by the court, "deny and deprive him of retirement and its advantages," in so far as said averment implies that the enforcement of the aforesaid order against the petitioner will deny and deprive him of retirement and its advantages, is a mere conclusion of law which this defendant is not required to answer. This defendant, however, states that if this petitioner has any right to retirement and its advantages, the aforesaid order and its enforcement does not deprive him of such right.

XV.

This defendant denies that the petitioner is by law and of right entitled to be retired with pay and that his name be placed upon the retired list of the United States Navy upon and after the 14th day of November, A. D. 1919, or any other date, for disability alleged in said petition to have been incurred by him in line of duty, upon the facts thereof having been ascertained in the manner alleged in said petition, or that, in the alternative, the petitioner is entitled to appear before a naval retiring board, for its action in the premises, and for more particularity the defendant refers to paragraph V of this answer.

48 XVI.

This defendant has no knowledge of what advice has been given said petitioner or what said petitioner believes, but denies that prior to and until October 29, 1919, or any other time, the interpretation placed upon the acts of Congress and regulations of the Navy De-

partment upon the subject of retirement, by the Navy Department of the United States and by the officials thereof having the subject for official discharge, was that officers of the United States Naval Reserve Force who had incurred physical disability in the line of duty were entitled to appear before a Naval Retiring Board, upon a finding and report of a board of medical survey of the existence of such disability and that its probable duration was permanent, and upon the recommendation of a board of medical survey that he be "ordered to appear before U. S. Naval Retiring Board"; and that any acts and regulations were by the defendant and the Navy Department up to said date given that effect and operation.

XVII

Defendant admits that prior to and until October 29, 1919, the interpretation theretofore placed upon the acts of Congress upon the subject of retirement by the Navy Department of the United States, and by the officials thereof having the subject for official discharge, was that officers of the United States Naval Reserve Force who had incurred physical disability in the line of duty were
49 eligible to be retired with pay and eligible to have their names placed upon the retired list of the United States Naval Reserve Force, but states that such interpretation was limited to cases in which the procedure prescribed for the retirement of officers of the Regular Navy, as set forth in the Revised Statutes of the United States, sections 1448 to 1453, was complied with and followed, and for more particularity the defendant refers to paragraph XII of this answer.

XVIII.

The defendant admits the averments in paragraph 18 of the petition, but states that the Judge Advocate General's opinion that officers of the United States Naval Reserve Force incurring disability in line of duty are entitled by law to be retired was qualified by the statement that "the laws relating to officers of the temporary Navy and Naval Reserve Force and Marine Corps Reserve plainly confer upon those officers the same rights of retirement for physical disability in line of duty as are given by law to officers of the permanent Navy and Marine Corps," and was further qualified by the statement that "in the Regular Navy the retirement of officers found physically incapacitated in line of duty is mandatory after approval of such finding and no discretion then exists in the President or the Secretary of the Navy to do otherwise than retire the officer concerned"; and defendant further states that the order referred
50 to in the petition as "the above mentioned order of October 29th," is not set forth in said petition nor described therein with particularity, and he avers that there was no order issued under date of "October 29th" with reference to the case of this petitioner but that the orders under which action was taken in this case are

those particularly described in paragraph XIII of this answer, and which were issued by the defendant as Secretary of the Navy on November 12, 1919, and by the Bureau of Navigation of the Navy Department on November 14, 1919, and November 17, 1919.

XIX.

The defendant admits the averments in paragraph 19 of the petition, but states that he is advised by the Judge Advocate General and believes that the communication of the Judge Advocate General, excerpts from which are quoted in said paragraph, has no application and was not intended to apply to the facts presented in the case of this petitioner, in whose case there has been merely a finding of facts by a board of medical survey, approved by the officer ordering said board but not approved by the Secretary of the Navy or by the President of the United States; and this defendant further avers that the aforesaid memorandum of the Judge Advocate General was not approved by the Secretary of the Navy and has never been published and promulgated by the Navy Department, and states
51 that by a general order issued by this defendant as Secretary of the Navy on July 1, 1919, known and designated as General Order No. 484, which said general order was issued by the Secretary of the Navy pursuant to law, and by virtue of section 161 of the Revised Statutes of the United States has the force and effect of law, it was ordered and directed that opinions or decisions of the Judge Advocate General "shall be the basis of official action by any bureau or any office or officer of the Navy Department or Marine Corps only after the approval of such opinion or decision by the Secretary of the Navy;" and this defendant further avers that the aforesaid memorandum of the Judge Advocate General of the Navy, which as aforesaid has not been approved by the Secretary of the Navy, is not binding upon this defendant or upon the United States; and this defendant further states that said memorandum of the Judge Advocate General related to the legality of an order issued by the Secretary of the Navy on October 29, 1919, relating generally to the retirement of certain classes of officers in the naval service, and not referring specifically or in terms to the case of this petitioner, and which was not applied to the case of this petitioner in which action was taken under an order issued by the Secretary of the Navy with specific reference to the petitioner's case; and this defendant further states that in said memorandum the Judge Advocate General qualified his opinion as to the legality of said order of October 29, 1919, by recommending "further investigation of its
52 legality," and "further consideration of the legal points involved," and by further recommending "that the Attorney General be asked for his opinion as to the legality of the aforesaid order;" and this defendant further states that, acting upon the advice of the Judge Advocate General contained in the aforesaid memorandum, and in accordance therewith he had, as Secretary of

the Navy, prior to the filing of this petition, given instructions that the question of the legality of the aforesaid order and of the action required to be taken thereunder be prepared for submission to the Attorney General of the United States for the official opinion of that officer, and that the submission of the aforesaid question to the Attorney General of the United States was prevented by the filing of the petition in this case, and that accordingly no official opinion has been rendered by the Attorney General as to the legality of the aforesaid order and of the action required to be taken thereunder, and that such question has not heretofore been adjudicated. And this defendant further states that said order of October 29, 1919, and the memorandum of the Judge Advocate General as to the legality of that order, are not material and have no application to the case of the petitioner.

XX.

Defendant admits the averments in paragraph 20 of the petition, and for more particularity refers to paragraphs X and XI of this answer.

53 XXI.

Defendant admits the averments in paragraph 21 of the petition, and for more particularity refers to paragraph XII of this answer.

Answering further said petition, this defendant says that the relief sought by the petitioner, "that the defendant forthwith permit the petitioner to appear before a Naval Retiring Board for its action upon the subject of his retirement for physical disability incurred in line of duty," rests in the sound discretion of the President of the United States, and that a Naval Retiring Board can acquire jurisdiction to act in any case only upon reference of such case to it by the Secretary of the Navy by the direction and at the discretion of the President of the United States, and that an order of this honorable court directing this defendant to submit the case of this petitioner to a Naval Retiring Board and to permit the petitioner to appear before said board, and the reference of the case of this petitioner to such Naval Retiring Board pursuant to such order of this court, would not confer jurisdiction upon such Naval Retiring Board over the case of said petitioner.

Defendant further says that the revocation and cancellation of the order referred to in paragraph 13 of the petition rests in the sound discretion of this defendant as Secretary of the Navy, and that this court is without jurisdiction to require him to revoke and cancel said order.

Defendant further says that he is not required by law to
54 transmit to the President for his action the name of the petitioner as eligible for retirement for physical disability incurred in line of duty, that this defendant, in so far as pertains

to matters within his jurisdiction as Secretary of the Navy, must exercise his independent judgment uncontrolled by this court in deciding whether any person in the naval service is eligible for retirement for physical disability incurred in line of duty, that in cases in which the retirement of any person in the naval service for physical disability is authorized by law this defendant makes recommendations to the President, based upon the record and findings of retiring boards, as to whether or not such person is eligible for retirement for physical disability incurred in line of duty, and, in accordance with section 1452 of the Revised Statutes of the United States, transmits to the President the record of the proceedings and decision of the board in each case, that there is no record of proceedings of any Naval Retiring Board in the case of this petitioner for this defendant to transmit to the President, and that if the petitioner desires to have his case considered by the President, and to have the President review the action of this defendant as Secretary of the Navy in any particular set forth in the petition and answer, he has a full, ample, and complete remedy under the law by appealing to the President in the manner provided and authorized in the regulations and instructions for the Navy of the United States, and that this court is without jurisdiction to consider and determine whether or not this petitioner, upon
55 the facts in his case, has incurred physical disability in line of duty for which he is eligible to be retired and to order and direct this defendant as Secretary of the Navy to certify to the President of the United States that petitioner is so eligible for retirement.

Further answering said petition, this defendant says that the relief therein sought against him involves the exercise of judgment and discretion in his official duties as Secretary of the Navy, the exercise of which by him this honorable court has no jurisdiction to control.

Wherefore, having fully answered the said petition and the rule to show cause issued herein, this defendant prays that the said petition be dismissed and the rule discharged, with costs.

JOSEPHUS DANIELS,
Secretary of the Navy.

JOHN E. LASKEY,
Attorney of the United States in and for the District of Columbia.

Per M.
MORGAN H. BEACH.
Per M.

DISTRICT OF COLUMBIA, *ss:*

I, Josephus Daniels, being first duly sworn, on oath depose and say that I am the Secretary of the Navy of the United States of America; that I have read over the foregoing answer by me subscribed and know the contents thereof; that the matters and

56 things therein stated of my own knowledge are true, and those stated upon information and belief I believe to be true.

JOSEPHUS DANIELS.

Subscribed and sworn to before me this 17th day of March, A. D. 1920.

[SEAL.]

R. H. MOSES,
Notary Public, D. C.

Motion to strike out.

(Filed April 1, 1920.)

In Supreme Court of District of Columbia.

Now comes the plaintiff and moves to strike out from the answer of the defendant to the amended petition herein as irrelevant and as violating the equity rules, the following:

1. From paragraph 2 of the answer beginning in the thirteenth line of page 2 the words "the evidence aforesaid being as follows, viz:" to and including the word "reaction" in the fifth line on the third page of said answer. And beginning with the words "this petitioner addressed a letter to the Surgeon General" in the sixth line on page 4 of said answer to and including the words "such was so essentially necessary" in the sixteenth line thereof.

2. From the third paragraph of said answer beginning with the words "and avers that if the law authorizes the retirement—" in the sixth line of said third paragraph to and including the words "Revised Statutes of the United States" at the end of said third paragraph.

3. From paragraph four of said answer beginning with the
57 words "and does not establish the—" in the last line on page 5 of said answer, to and including the words "board of medical survey" in the sixth line of the sixth page thereof. And beginning with the words "but this defendant avers that the said recommendation" in the twenty-second line on page 6 of said answer, to and including the words "Secretary of the Navy" in the second line of page seven thereof.

4. From paragraph 5 of said answer beginning with the words "and that such board of medical" in the ninth line of paragraph 5 to and including the word "States and" in the first line of page 8 of said answer, and beginning with the words "and states that, even if the law authorizes" in the ninth line of page 8 of said answer to and including the words "Statutes of the United States" in the eighteenth line of page 8 of said answer.

5. From paragraph 7 of said answer beginning with the words "and this defendant states" in the fifteenth line of said paragraph 7, to and including the words "of the Revised Statutes of the United States" in the last line of page 9 of said answer.

6. From paragraph 8 of said answer beginning with the words "and states that action in the case of this petitioner was" in the

eight line of said paragraph 8, to and including the words "from active duty" in the last line of said paragraph 8.

7. From paragraph 9 of said answer beginning with the words "This defendant states that the question of what" in the first line of said paragraph 9, to and including the words "been decided
58 by the Comptroller of the Treasury, and" in the eleventh line of paragraph 9 thereof.

8. From paragraph 10 beginning in the third line of said paragraph the words "and avers that he has not been directed by the President to refer the case of this petitioner to such Naval Retiring Board" and beginning with the words "and further says" in the eighth line of said paragraph 10, to and including the words "of the Revised Statutes of the United States" in the last line of paragraph 10.

9. Beginning with the words "And this defendant states that the act of Congress last cited" in the thirty-fifth line of page 13 of said answer, to and including the words "Naval Reserve Force for physical disability incurred in line of duty" in the tenth line of page 14 of said answer. And beginning with the words "On October 27, 1919, a written memorandum was furnished" in the twentieth line of page 15 of said answer, to and including the words "petitioner to a Naval Retiring Board" in the last line of paragraph 12 of said answer.

10. From paragraph 19 of said answer beginning with the words "and this defendant" in the ninth line of said paragraph, to and including the words "to the case of the petitioner" in the last line of paragraph 19.

11. From paragraph 21 of said answer beginning with the words "and that a Naval Retiring Board" in the fourth line of the 23rd page of said answer, to and including the words "upon such Naval Retiring Board over the case of said petitioner" in the thir-
59 teenth line of page 23 thereof. And beginning with the words "that in cases in which the" in the 26th line of the 23rd page of said answer, to and including the words "regulations and instructions for the Navy of the United States" in the tenth line of page 24 thereof.

DANIEL THEW WRIGHT,
PHILIP ERSHLER,
Attorneys for Plaintiff.

Order striking portions of answer.

(Filed April 28, 1920.)

In Supreme Court of District of Columbia.

This cause coming on to be heard upon the motion of the petitioner to strike out certain parts of the answer and return herein heretofore filed by the defendant, and the court having heard the argument of

counsel and being fully advised in the premises, finds the said motion to be in part well taken.

Wherefore it is this 28″ day of April, A. D. 1920, ordered by the court that there be and are hereby stricken rfom the said answer, that is to say, from paragraph 2 thereof beginning in the 13th line of page 2 the words, "the evidence aforesaid being as follows, viz:" to and including the words "such was so essentially necessary" at the end of paragraph 2 of said answer.

And, beginning with the words, "and avers that if the law authorizes the retirement" in the sixth line of the 3rd paragraph to and including the words "Revised Statutes of the United States" at the end of the 3rd paragraph.

60 And, beginning with the words, "and does not establish the" in the last line on page 5 of said answer, to and including the words "board of medical survey" in the sixth line of the 6th page thereof.

And, from paragraph 5 beginning with the words "and that such board of medical" in the 9th line of said paragraph to and including the words "States and" in the first line of page 8 of said answer.

And, from paragraph 9 thereof beginning with the words "this defendant states that the question of what" in the first line of said paragraph to and including the words "been decided by the Comptroller of the Treasury, and" in the 11th line of paragraph 9 thereof.

And, from paragraph ten thereof beginning with the words "and further says" in the 8th line of said paragraph, to and including the word "and" in the 13th line of said paragraph.

And, beginning with the words "and this defendant states that the act of Congress last cited" in the 35th line of page 13 of said answer, to and including the words "Naval Reserve Force for physical disability incurred in line of duty" in the 10th line of page 14 of said answer.

And, beginning with the words "On October 27, 1919, a written memorandum was furnished" in the 20th line of page 15 of said answer, to and including the words "petitioner to a Naval Retiring Board" in the last line of paragraph 12 of said answer.

61 And, from paragraph 19 of said answer beginning with the words "and this defendant" in the 9th line of said paragraph, to and including the words "to the case of the petitioner" in the last line of paragraph 19.

And, from paragraph 21 of said answer beginning with the words "and that a Naval Retiring Board" in the 4th line of the 23rd page of said answer, to and including the words "upon such Naval Retiring Board over the case of said petitioner" in the 16th line of page 23 thereof, and beginning with the words "that in cases in which " in the 26th line of the 23rd page of said answer, to and includ .he words "regulations and instructions for the Navy of the Un..ed States" in the tenth line of page 24 thereof.

To which ruling of the court the defendant excepts. In other respects said motion is overruled, to which plaintiff excepts. Leave is granted to the defendant to file within five days a fair copy of answer in accordance with this order.

F. L. SIDDONS,
Justice.

O. K.
M. H. B.
WRIGHT.

Answer of Josephus Daniels to amended petition and rule to show cause.

(Filed May 4, 1920.)

In Supreme Court of District of Columbia.

Josephus Daniels, Secretary of the Navy, now, and at all times, saving and reserving unto himself all exceptions, imperfections, uncertainties, and defects in the petition for a writ of mandamus, filed herein, and reserving unto himself the benefit of the lack
62 of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of this court to direct him, as Secretary of the Navy, to perform any act involving the exercise of his judgment and discretion in matters within his jurisdiction, or to the lack of status of the petitioner to seek or obtain the relief sought in said petition, and relying on the same, as if demurrer had been specifically interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, answering, says:

I.

He admits that the petitioner is a citizen of the United States and a resident of the District of Columbia; and that the defendant is the Secretary of the Navy of the United States of America duly commissioned and acting as such; but states that the name of the defendant is Josephus Daniels and not Josephus M. Daniels as named in the title of this case.

II.

He admits that the petitioner is an enrolled member of the United States Naval Reserve Force, holding the provisional rank and grade of lieutenant commander in the Naval Auxiliary Reserve, being class three of the United States Naval Reserve Force, and was such at all the times referred to in paragraph four of the petition. He admits that petitioner has sustained physical disabilities, but has no knowlege that the petitioner now suffers such physical disabili-
63 ties, and states that the evidence of record in the Navy

Department is not sufficient to satisfy him, as Secretary of the Navy, and he accordingly denies that the aforesaid physical disabilities were incurred by the petitioner in line of duty as such member of the United States Naval Reserve Force, are permanent, and render the petitioner unfit for service in the Navy.

III.

Answering paragraph three of the petition, this defendant denies that the physical disabilities of the petitioner, if such now exist and even if incurred in the line of duty as a member of the United States Naval Reserve Force, render the petitioner eligible for and entitled to retirement together with all the pay, privileges, and emoluments which pertain thereto.

IV.

Answering paragraph four of the petition, this defendant admits that the existence of disability in the case of this petitioner was ascertained and found to exist by a board of medical survey of the Navy Department of the United States duly and lawfully constituted and acting according to law, to wit, in accordance with regulations issued by the Secretary of the Navy with the approval of the President as provided by section 1547 of the Revised Statutes of the United States, but states that such finding of said board of medical survey was made on October 14, 1919.

64 Answering further paragraph four of said petition, this defendant admits that the said board further found that by reason of the said disabilities, the petitioner was in its opinion "unfit for service," that the probable future duration of such condition was in its opinion "permanent," and that said board in its said finding and report recommended as follows: "That he (petitioner) be ordered to appear before the U. S. Naval Retiring Board"; that the said findings and recommendations of the said board were in writing duly announced, promulgated, and reported to the commandant of the navy yard, Washington, D. C., the convening officer of said board, and the officer who had ordered said survey, for transmission to the Bureau of Medicine and Surgery; that the said commandant duly approved the said findings and recommendation with his signature endorsed thereon and forwarded the same to the Bureau of Medicine and Surgery. But this defendant avers that the said recommendation of said board was disapproved by the said Bureau of Medicine and Surgery, November 11, 1919, over the signature of the acting chief of said bureau, and that the said recommendation of said board was in terms and personally disapproved by this defendant, over his signature as Secretary of the Navy, on November 12, 1919; and this defendant further states that he has the authority, power, and duty, in the exercise of his discretion as Secretary of the Navy, to disapprove the findings and recommendations of boards

of medical survey in any case and that the findings and recom-
65 mendations of such boards are nullified and rendered invalid when so disapproved by him as Secretary of the Navy.

V.

This defendant denies that by reason of the foregoing and the laws applicable thereto, the petitioner is entitled to be placed on the retired list of the Navy or of the Naval Reserve Force of the United States, and states that the board of medical survey referred to in paragraph four of the petition and of this answer thereto was constituted and proceeded in accordance with the regulations for the government of the Navy of the United States, viz, articles 361 to 366 of the Navy Regulations, 1913, and not in accordance with any statute of the United States. That under the law no persons may be placed on the retired list of the Navy or Naval Reserve Force of the United States, except in the discretion and by the order of the President of the United States, notwithstanding that they may be suffering from physical disability incurred in the line of duty and of permanent duration.

Answering further paragraph five of this petition, the defendant denies that this petitioner is entitled to appear before a United States Naval Retiring Board, for its action upon the subject of his retirement, and states that, even if the law authorizes the retirement of members of the United States Naval Reserve Force for physical disability incurred in line of duty and confers upon
66 such members all the benefits and privileges of retirement enjoyed by officers of the regular Navy of the United States, it would be necessary before such members could become entitled to appear before such board that the Secretary of the Navy by the direction of the President of the United States refer the cases of such members to a Naval Retiring Board, in conformity with section 1448 of the Revised Statutes of the United States, and the defendant further states that the President has not directed him, as Secretary of the Navy, to refer the case of this petitioner to a Naval Retiring Board, and that the case of this petitioner has not been referred to such board by the Secretary of the Navy.

VI.

This defendant denies that at the time of the survey referred to in paragraph four of the petition and of this answer thereto the regulations in force (issued and adopted by the Secretary of the Navy with the approval of the President) provided for such a survey and report by a board of medical survey to the officer ordering the survey, as the method of procedure required to be had before the appearance of petitioner before and action of a retiring board upon the matter of his retirment.

VII.

This defendant denies that according to the regulations (issued and adopted by the Secretary of the Navy with the approval of the President) in force at the time of the aforesaid report of the
67 board of medical survey in the case of this petitioner, when a regular officer of the naval service of rank corresponding with the rank of petitioner was found and reported by a board of medical survey as "suffering physical disability incurred in line of duty, present condition unfit for service, probable future duration permanent" and when recommended by said board "That he be ordered to appear before the U. S. Naval Retiring Board," it was the rule, custom and regulation of the Navy Department that such officer be ordered as a matter of course before a Naval Retiring Board for its action, in order that the matter of his retirement might duly and regularly come before the President for his action; and this defendant states that according to the aforesaid regulations then in force it was the rule, custom, and regulation of the Navy Department that a report of a board of medical survey as aforesaid, in the case of an officer of the regular Navy as aforesaid should be acted on by the officer ordering said survey and transmitted by such officer direct to the Bureau of Medicine and Surgery for recommendation and further transmission to the Bureau of Navigation for final action, and that according to the rule, custom and regulation of the Navy Department such officer was not ordered before a Naval Retiring Board unless the recommendation of the board of medical survey as aforesaid was approved by the Bureau of Medicine and Surgery, and concurred in by he Secretary of the Navy, and the order to such officer to appear before a Naval Retiring Board
68 was issued by the Secretary of the Navy, in writing over his official signature and expressly stated therein to be "By direction of the President," in conformity with section 1448 of the Revised Statutes of the United States.

VIII.

This defendant denies that according to the custom of the Navy Department and the regulations in force at the times referred to in paragraph four of the petition, petitioner upon the findings and report of said board of medical survey referred to in paragraph four of the petition would have been ordered and permitted to appear before a Naval Retiring Board for its action, except for an order issued by the defendant on October 29, 1919, and states that action in the case of this petitioner was taken in accordance with an order issued by this defendant, over his official signature as Secretary of the Navy, under date of November 12, 1919, addressed to the Chief of the Bureau of Navigation, forwarding to the latter official the report of the board of medical survey aforesaid, and stating: "The recommendation of the board of medical survey in this case is not ap-

proved. In accordance with the recommendation of the Surgeon General, as set forth in the third endorsement, it is directed that this officer be ordered to proceed to his home and be released from active duty."

69 IX.

This defendant says that he has no information as to what compensation, pay, and emoluments, if any, the petitioner will be entitled to receive if placed upon the retired list of the Navy.

This defendant admits that as Secretary of the Navy he has refused to permit the petitioner to appear before, and has prevented his appearance before a Naval Retiring Board, and avers that he has not been directed by the President to refer the case of this petitioner to such Naval Retiring Board; and this defendant respectfully states that this honorable court is without jurisdiction to order him, as Secretary of the Navy, to refer the case of this petitioner to such Naval Retiring Board, that for such Naval Retiring Board to acquire jurisdiction in the case of this petitioner it would be necessary that such case be referred to it by the Secretary of the Navy by direction of the President and at the discretion of the President, in accordance with section 1448 of the Revised Statutes of the United States.

XI.

Defendant admits that as Secretary of the Navy he has prevented the petitioner from having the question of his eligibility for retirement presented to or considered by a Naval Retiring Board, but avers that he has not been directed by the President to refer the case of this petitioner to such Naval Retiring Board and that he has not prevented the petitioner from appealing to the President to
70 direct this defendant as Secretary of the Navy to refer the case of this petitioner to such Naval Retiring Board; and this defendant further states that under the provisions of regulations issued by him as Secretary of the Navy pursuant to law, to wit, section 161 of the Revised Statutes of the United States, it is the right of this petitioner to appeal to the President as the common superior from any order or decision of the Secretary of the Navy, and to forward such appeal to the President through the Navy Department, or to address such appeal directly to the President in case of refusal or failure of the Navy Department to forward same; and this defendant further states that he has not refused or failed to forward to the President any such appeal from this petitioner and that he has not received any such appeal to be forwarded to the President; and this defendant further states that if directed by the President to refer the case of this petitioner to a Naval Retiring Board he will, as Secretary of the Navy, obey such direction of the

President; and this defendant respectfully states that this honorable court is without jurisdiction to order him, as Secretary of the Navy, to refer the case of this petitioner to such Naval Retiring Board.

XII.

This defendant denies that prior to and until the act of Congress of October 6th, 1917, creating "The Bureau of War Risk Insurance," the petitioner upon the existence of the disability, findings, reports and recommendations set out in paragraph 4 of the peti-
71 tion, was thereupon entitled to appear before a Naval Retiring Board. He admits that he has refused to permit petitioner to appear before, and has prevented his appearance before a Naval Retiring Board, but denies that such action of the defendant was solely for the reason that in the judgment of defendant said act of October 6th, 1917, deprived petitioner of eligibility for retirement for physical disability incurred in line of duty, although he admits signing an official communication addressed to petitioner by defendant, a substantially correct copy whereof is appended to the petition marked "Exhibit B" and made part thereof, and this defendant says that the facts and circumstances under which such action was taken and the reasons therefor were as follows, viz:

The United States Naval Reserve Force was created by an act of Congress approved August 29, 1916, entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes" (39 Statutes at Large, 556, 587), which said act of Congress provided, in part, that—

"All members of the Naval Reserve Force shall, when actively employed as set forth in this act, be entitled to the same pay, allowances, gratuities, and other emoluments as officers and enlisted men of the naval service on active duty of corresponding rank or rating and of the same length of service. When not actively employed in the Navy, members of the Naval Reserve Force shall not be
72 entitled to any pay, bounty, gratuity, or pension except as expressly provided for members of the Naval Reserve Force by the provisions of this act."

The Judge Advocate General of the Navy in an official opinion dated May 20, 1918, held that retirement with pay for physical disability was not expressly provided for by said act of August 29, 1916, relating to the Naval Reserve Force, that no retired list was authorized for officers of said reserve force, and that there was no law authorizing the President to place such officers on the retired list of the Navy, which said opinion was accepted and the substance thereof published by this defendant as Secretary of the Navy, in an official publication entitled Court-Martial Order No. 50, 1918, dated 31 May, 1918, and no members of the Naval Reserve Force were in fact retired for physical disability under the provisions of said act

of August 29, 1916, either before or after the act of October 6, 1917, referred to in paragraph 12 of the petition.

On July 1, 1918, the President approved an act entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and nineteen, and for other purposes" (40 Statutes at Large, 704, 710), which said act provided, in part, "that no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty."

73 After the enactment of the law last cited the Judge Advocate General rendered an official opinion holding that said law "indicates an intention on the part of Congress to extend the privilege of retirement for physical disability incurred in the line of duty, which is enjoyed by the officers of the regular Navy, to those members of the Naval Reserve Force in like situations and while they are in the active service of the United States," and that "the retirement for physical disability of an officer of the Naval Reserve Force will not change his status to that of an officer of the regular Navy as such a change in office could be accomplished only by the exercise of the appointing power," but that an officer of the Naval Reserve Force so retired for physical disability incurred in line of duty "will continue to be a member of the Naval Reserve Force although on the retired list thereof and entitled to the same benefits as though he were an officer on the retired list of the regular Navy," which said opinion of the Judge Advocate General was accepted and the substance thereof published by this defendant as Secretary of the Navy in an official publication entitled Court-Martial Order No. 141, 1918, dated 31 October, 1918. And this defendant further states that pursuant to the law as construed by the Judge Advocate General certain members, approximately ten in number, of the United States Naval Reserve Force, and one member of the United States Marine Corps Reserve, were in fact placed on the retired list for physical disability incurred in line of duty, such action

74 being taken in each case upon the written order of the President over his personal signature as such, which said order of the President in each case was the record of preceedings of a retiring board convened in accordance with the Revised Statutes of the United States before which retiring board the member of the Naval Reserve Force so retired had been ordered and permitted to appear by the Secretary of the Navy, as evidenced by an official communication addressed to such member over the signature of the Secretary of the Navy, and expressly stated therein to be "By direction of the President," all in accordance with section 1448 of the Revised Statutes of the United States; and this defendant states that no member of the Naval Reserve Force or Marine Corps Reserve was transferred to the retired list at any time except pursuant to the writtent order of the President in each case, as aforesaid, which said orders were issued by the President under date of 5 June, 1919,

31 July, 1919, 2 August, 1919, and 29 September, 1919, and each of which said orders stated that it was "in conformity with the provisions of section 1453 of the Revised Statutes, and those of the act of July 1, 1918."

XIII.

The defendant admits that as Secretary of the Navy he has directed and caused and required the Bureau of Navigation of the Navy Department to issue to petitioner an order in part as follows:

"Having been found physically unfit for active duty in the
75 U. S. Naval Reserve Force by the Board of Medical Survey before which you appeared on October 14th, 1919, the Secretary of the Navy has directed that you be ordered to your home and be released from all active duty."

And this defendant states that said order issued by the Bureau of Navigation was dated November 14th, 1919, and was issued pursuant to the order of this defendant to said Bureau of Navigation dated November 12, 1919, and quoted in paragraph eight of this answer.

Defendant further states that the Bureau of Navigation, pursuant to his aforesaid order of November 12, 1919, issued to the petitioner an order, dated November 17, 1919, in part as follows:

"You are hereby detached from such duty as may have been assigned you; will proceed to your home and regard yourself honorably discharged from active service in the Navy."

XIV.

This defendant is advised and believes and accordingly avers that said order mentioned in paragraph 13 of the petition has already been enforced against the petitioner, and states that if such is not the case he admits that he will, unless prevented by the court, cause the said order to be enforced against the petitioner, and he respectfully states that this honorable court is without jurisdiction to prevent him, as Secretary of the Navy, from enforcing said order,

issued by him in the exercise of his discretion and in the dis-
76 charge of his duties under the law in the course of and as an incident to the demobilization of the Naval Reserve Force.

Answering further paragraph fourteen of the petition, this defendant states that the averment therein that the defendant will, unless prevented by the court, "deny and deprive him of retirement and its advantages," in so far as said averment implies that the enforcement of the aforesaid order against the petitioner will deny and deprive him of retirement and its advantages, is a mere conclusion of law which this defendant is not required to answer. This defendant, however, states that if this petitioner has any right to retirement and its advantages, the aforesaid order and its enforcement does not deprive him of such right.

XV.

This defendant denies that the petitioner is by law and of right entitled to be retired with pay and that his name be placed upon the retired list of the United States Navy upon and after the 14th day of November, A. D. 1919, or any other date, for disability alleged in said petition to have been incurred by him in line of duty, upon the facts thereof having been ascertained in the manner alleged in said petition, or that, in the alternative, the petitioner is entitled to appear before a Naval Retiring Board, for its action in the premises, and for more particularity the defendant refers to paragraph V of this answer.

77

XVI.

This defendant has no knowledge of what advice has been given said petitioner or what said petitioner believes, but denies that prior to and until October 29, 1919, or at any other time, the interpretation placed upon the acts of Congress and regulations of the Navy Department upon the subject of retirement by the Navy Department of the United States, and by the officials thereof having the subject for official discharge, was that officers of the United States Naval Reserve Force who had incurred physical disability in the line of duty were entitled to appear before a Naval Retiring Board, upon a finding and report of a board of medical survey of the existence of such disability and that its probable duration was permanent, and upon the recommendation of a board of medical survey that he be "ordered to appear before U. S. Naval Retiring Board"; and that any acts and regulations were by the defendant and the Navy Department up to said date given that effect and operation.

XVII.

Defendant admits that prior to and until October 29, 1919, the interpretation theretofore placed upon the acts of Congress upon the subject of retirement by the Navy Department of the United States, and by the officials thereof having the subject for official discharge, was that officers of the United States Naval Reserve
78 Force who had incurred physical disability in the line of duty were eligible to be retired with pay and eligible to have their names placed upon the retired list of the United States Naval Reserve Force, but states that such interpretation was limited to cases in which the procedure prescribed for the retirement of officers of the regular Navy, as set forth in the Revised Statutes of the United States, sections 1448 to 1453, was complied with and followed, and for more particularity the defendant refers to paragraph XII of this answer.

XVIII.

The defendant admits the averments in paragraph 18 of the petition, but states that the Judge Advocate General's opinion that officers of the United States Naval Reserve Force incurring disability in line of duty are entitled by law to be retired was qualified by the statement that "the laws relating to officers of the temporary Navy and Naval Reserve Force and Marine Corps Reserve plainly confer upon those officers the same rights of retirement for physical disability in line of duty as are given by law to officers of the permanent Navy and Marine Corps," and was further qualified by the statement that "in the regular Navy the retirement of officers found physically incapacitated in line of duty is mandatory after approval of such finding and no discretion then exists in the President or the Secretary of the Navy to do otherwise than retire the officer concerned"; and defendant further states that the order referred
79 to in the petition as "the above-mentioned order of October 29th," is not set forth in said petition nor described therein with particularity, and he avers that there was no order issued under date of "October 29th" with reference to the case of this petitioner but that the orders under which action was taken in this case are those particularly described in paragraph XIII of this answer, and which were issued by the defendant as Secretary of the Navy on November 12, 1919, and by the Bureau of Navigation of the Navy Department on November 14, 1919, and November 17, 1919.

XIX.

The defendant admits the averments in paragraph 19 of the petition, but states that he is advised by the Judge Advocate General and believes that the communication of the Judge Advocate General, excerpts from which are quoted in said paragraph, has no application and was not intended to apply to the facts presented in the case of this petitioner, in whose case there has been merely a finding of facts by a board of medical survey, approved by the officer ordering said board, but not approved by the Secretary of the Navy or by the President of the United States.

XX.

Defendant admits the averments in paragraph 20 of the petition, and for more particularity refers to paragraphs X and XI of this answer.

80 XXI.

Defendant admits the averments in paragraph 21 of the petition, and for more particularity refers to paragraph XII of this answer.

Answering further said petition, this defendant says that the relief sought by the petitioner, "that the defendant forthwith permit the petitioner to appear before a Naval Retiring Board for its action upon the subject of his retirement for physical disability incurred

in line of duty," rests in the sound discretion of the President of the United States.

Defendant further says that the revocation and cancellation of the order referred to in paragraph 13 of the petition rests in the sound discretion of this defendant as Secretary of the Navy, and that this court is without jurisdiction to require him to revoke and cancel said order.

Defendant further says that he is not required by law to transmit to the President for his action the name of the petitioner as eligible for retirement for physical disability incurred in line of duty; that this defendant, in so far as pertains to matters within his jurisdiction as Secretary of the Navy, must exercise his independent judgment, uncontrolled by this court, in deciding whether any person in the naval service is eligible for retirement for physical disability incurred in line of duty, and that this court is without jurisdiction to consider and determine whether or not this petitioner, upon
81 the facts in this case, has incurred physical disability in line of duty for which he is eligible to be retired and to order and direct this defendant as Secretary of the Navy to certify to the President of the United States that petitioner is so eligible for retirement.

Further answering said petition, this defendant says that the relief therein sought against him involves the exercise of judgment and discretion in his official duties as Secretary of the Navy, the exercise of which by him this honorable court has no jurisdiction to control.

Wherefore, having fully answered the said petition and the rule to show cause issued herein, this defendant prays that the said petition be dismissed and the rule discharged, with costs.

JOSEPHUS DANIELS,
Secretary of the Navy.

JOHN E. LASKEY,
Attorney of the United States
in and for the District of Columbia.
MORGAN M. BEACH.
Per M.

DISTRICT OF COLUMBIA, *ss:*

I, Josephus Daniels, being first duly sworn, on oath depose and say that I am the Secretary of the Navy of the United States of America; that I have read over the foregoing answer by me subscribed and know the contents thereof; that the matters and
82 things therein stated of my own knowledge are true, and those stated upon information and belief I believe to be true.

JOSEPHUS DANIELS.

Subscribed and sworn to before me this 17th day of March A. D. 1920.

L. S.

R. H. MOSES,
Notary Public, D. C.

Demurrer.

(Filed May 6, 1920.)

In Supreme Court of District of Columbia.

Now comes the plaintiff and demurs to the answer herein filed and says the same is bad in substance.

DANIEL THEW WRIGHT,
PHILIP ERSHLER,
Attorneys for Plaintiff.

The questions of law to be argued upon the foregoing demurrer is that upon the facts stated in the bill and admitted in the answer, and otherwise set forth in the answer the plaintiff is entitled to judgment and to the relief prayed.

DANIEL THEW WRIGHT.

U. S. DISTRICT ATTORNEY,

SIR: Please take notice that the foregoing demurrer will be calendared for hearing on Friday, May 14th, at ten o'clock a. m.

DANIEL THEW WRIGHT,
Attorney for Plaintiff.

83 *Stipulation.*

(Filed January 28, 1921.)

In Supreme Court of District of Columbia.

It is hereby stipulated between the parties in open court that the court consider, in ruling upon the plaintiff's demurrer to the respondent's answer, the letter of respondent to the chairman Committee on Naval Affairs of the House of Representatives, under date of March 20, 1920, which is as follows:

"MY DEAR MR. CHAIRMAN: There are several cases in the naval service of officers of the Naval Reserve Force who are suffering from physical disability incurred in line of duty which raise the very poignant question of whether or not they should be retired in a manner similar to that under which officers of the regular Navy are placed on the retired list on account of physical disability incurred in line of duty.

"Under date of May 20, 1918, the Judge Advocate General of the Navy, in passing upon the question of whether or not officers of the Naval Reserve Force were eligible for retirement for physical disability incurred in line of duty under the provisions of the act of August 29, 1916, rendered the following opinion, which was subsequently published as the decision of the department:

"'The laws relating to retirement in the regular Navy are not applicable to officers of the Naval Reserve Force, especially in view

of the provisions of the act of August 29, 1916, to the effect that
"when not actively employed in the Navy, members of the
84 Naval Reserve Force shall not be entitled to any pay, bounty,
gratuity, or pension except by the provisions of this act."
Retirement with pay for physical disability is not expressly provided by the act; no retired list is authorized for officers of the Reserve Force, and there is no law authorizing the President to place them on the retired list of the Navy. Officers of the Reserve Force are, however, entitled to compensation for disability resulting from injuries suffered or disease contracted in line of duty under the war risk insurance act.'

"Subsequent to this decision the department recommended and Congress enacted the law of July 1, 1918, containing a negative provision the wording of which is such as to leave considerable doubt in my mind concerning the intention which Congress desired to convey in this matter.

"Under date of October 19, 1918, the Judge Advocate General of the Navy, in construing the provisions of said act above referred to, rendered the following opinion, which was subsequently published as the decision of the department:

"'An analysis of so much of the act of July 1, 1918, as provides that "no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in the line of duty," indicates an intention on the part of Congress to extend the privilege of retirement for physical disability incurred in the line of duty, which is enjoyed by the officers of the regular Navy, to those members of the Naval Reserve Force in like situations, and while they are in the active service of the United States, and not to extend
to them the privilege of retirement for length of service. This
85 conclusion is borne out by the negative proviso "that no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in the line of duty," which operates as a prohibtion on all members of the Naval Reserve Force save those enlisted men of the naval service who have been transferred to the Fleet Naval Reserve and are expressly excepted. The retirement for physical disability of an officer of the Naval Reserve Force will not change his status to that of an officer in the regular Navy, as such a change in office could be accomplished only by an exercise of the appointing power. Thereupon such officer will continue to be a member of the Naval Reserve Force, although on the retired list thereof, and entitled to the same benefits as though he were an officer on the retired list of the regular Navy.'

"The Judge Advocate General was further of the opinion that if certain officers of the Naval Reserve Force were physically disabled in the line of duty while officers of the Naval Reserve Force in the active service of the United States, and that if, after the approval of the act of July 1, 1918, they were still on the active list of the Naval Reserve Force, they would be eligible for retirement

for physical disability incurred in the line of duty within the meaning of the act of July 1, 1918. Acting under this decision some officers of the Naval Reserve Force were retired for physical disability incurred in line of duty, but upon further consideration I entertain grave doubts concerning whether or not Congress intended the foregoing negative provision to authorize the re-
86 tirement of officers of the Naval Reserve Force for physical disability incurred in line of duty as contended by the Judge Advocate General of the Navy in the opinion above quoted. My doubts upon this point have been further augmented by the provisions for financial and other relief which Congress has provided through the war risk insurance act approved October 6, 1917, and the amendments thereto approved June 25, 1918, and December 24, 1919; the vocational rehabilitation act, approved June 27, 1918; and the fact that Congress has not made any provision for the retirement of officers of the Army of a corresponding status.

"Feeling uncertain as to the intent of Congress in this matter, I believe it advisable that the question be submitted to Congress for determination by means of a bill which will either affirm in no doubtful terms the provisions of the act of July 1, 1918, or provide that officers of the Naval Reserve Force shall not hereafter be placed on the retired list.

"I have therefore to recommend that if your committee is favorable to the retirement of these officers the following provision be enacted:

"'That all officers of the Naval Reserve Force who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the regular Navy who have incurred physical disability in line of duty.'

"If, on the other hand, your committee is not favorable to
87 the retirement of said officers, it is recommended that the following provision be enacted:

"'That no officer of the Naval Reserve Force shall be eligible for retirement on account of physical disability incurred in line of duty.'

"If the latter provision is enacted into law, the officers of the Naval Reserve Force will be placed in precisely the same position as that now occupied by temporary officers of the Army.

"Sincerely, yours,

"JOSEPHUS DANIELS,
"*Secretary of the Navy.*
"DAN THEW WRIGHT,
"*Attorney for Plaintiff.*
"JOHN E. LASKEY,
"*Attorney of the United States in and for the District of Columbia,*
"*Attorney for Defendant.*"

Order sustaining demurrer, &c.

(Filed January 28, 1921.)

In Supreme Court of District of Columbia.

This cause came on to be heard upon the petition, the rule to show cause, the answer to said rule and petition, demurrer to said answer, and the stipulation filed herein, and, after argument by the respective attorneys of record, was submitted to the court. Whereupon, the same being considered, it is, this 28th day of January, 1921:

Ordered, that said demurrer be, and the same is hereby, sustained, thereupon the respondents by their said attorneys, elect to stand upon said answer.

88 Wherefore, it is considered and ordered that a writ of mandamus be issued herein directed to the respondent, commanding him to revoke and rescind his order of date of November 12, 1919, referred to in paragraph 8 of his said answer herein, and to permit the petitioner to appear before, and to refer the case of the petitioner to, a Naval Retiring Board of the United States Navy, to the end that such Naval Retiring Board may inquire into and determine the facts touching the nature and occasion of the disability of the petitioner, and proceed further according to law in the premises.

Further, that the petitioner recover of said respondents his costs of suit and have execution therefor as the same are taxed by the clerk.

It is further considered that the question of damages, if any, to which the plaintiff may be entitled from the defendant, is reserved for future determination according to law.

F. L. SIDDONS,
Justice.

From the foregoing, the respondents, by their said attorneys, in open court note an appeal to the Court of Appeals of the District of Columbia.

F. L. SIDDONS,
Justice.

Assignments of error.

(Filed February 14, 1921.)

In Supreme Court of District of Columbia.

Now comes the respondent, Josephus Daniels, Secretary of the Navy, by his attorney, and assigns as error in the above-entitled cause the following:

89 1. That the court erred in sustaining the demurrer to the answer of the respondent filed in the above-entitled cause.

2. That the court erred in entering an order awarding a writ of mandamus.

3. That the court erred in not overruling the demurrer to the answer and dismissing the petition filed in this cause.

JOHN E. LASKEY,
Attorney of the United States in and for the District of Columbia,
Attorney for Respondent.

Designation of record.

(Filed February 14, 1921.)

In Supreme Court of District of Columbia.

The clerk will include in the transcript of record on appeal in the above-entitled cause the following:

(1) Petition for mandamus.
(2) Rule to show cause, issued November 18, 1919.
(3) Order extending time to answer.
(4) Amended petition for mandamus.
(5) Rule to show cause issued March 2, 1920.
(6) Order extending time to answer.
(7) Answer of respondents.
(8) Motion to strike out answer.
(9) Order striking out portions of answer.
(10) Fair copy of answer of respondents.
(11) Demurrer to answer.
(12) Stipulation filed January 28, 1921.
90 (13) Order sustaining demurrer and order to issue writ and note of appeal.
(14) Assignment of error.
(15) This designation.

JOHN E. LASKEY,
Attorney of the United States in and for the District of Columbia,
Attorney for Respondent.

Clerk's certificate.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 73, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made

part of this transcript, in cause No. 63066 at law, wherein George A. Berry is plaintiff and Josephus M. Daniels, Secretary of the Navy of the United States of America, is defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington in said District, this 9th day of March, 1921.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.
By W. E. WILLIAMS,
Assistant Clerk.

(Endorsed on cover:) District of Columbia Supreme Court. No. 3541. Josephus Daniels, Secretary of the Navy of the United States of America, appellant, vs. George A. Berry. Court of Appeals, District of Columbia. Filed Mar. 16, 1921. Henry W. Hodges, clerk.

91 In Court of Appeals of District of Columbia.

TUESDAY, *September 20th, A. D. 1921.*

Order substituting parties appellant.

The retirement of Josephus Daniels and the appointment of Edwin Denby as Secretary of the Navy having been suggested in the above-entitled cause, it is, on motion filed herein, this day ordered by the court that the said Edwin Denby, Secretary of the Navy, be, and he is hereby, made the party appellant in said cause in the place and stead of the said Josephus Daniels, retired.

MONDAY, *February 6th, A. D. 1922.*

Argument and submission.

The argument in the above-entitled cause was commenced by Mr. Peyton Gordon, attorney for the appellant, and was continued by Mr. Dan Thew Wright, attorney for the appellee, and was concluded by Mr. Peyton Gordon, attorney for the appellant.

92 In the Court of Appeals of the District of Columbia.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the court:

Appellee George A. Berry, plaintiff below, a lieutenant commander in the Naval Reserve Force, filed his petition in the Supreme Court of the District of Columbia, praying a writ of mandamus to compel the Secretary of the Navy to revoke an order discharging

him from the service, and to permit him to have a hearing before a Navy Retiring Board.

It appears that plaintiff, while in the naval service, became disabled and unfit to perform further duty. According to the regulations of the Navy Department, he was examined by a naval board of medical survey, and found to be unfit for service. His disabilities were found to be permanent, occasioned "in line of duty" and "not the result of his own misconduct." The board recommended "that he be ordered to appear before the U. S. Naval Retiring Board." The Secretary in his answer admits the regularity of the action of the board of medical survey, and that it was acting in accordance with the regulations issued by the Secretary of the Navy, with the approval of the President; but avers that "he has the authority, power, and duty, in the exercise of his discretion as Secretary of the Navy, to disapprove the findings and recommendations of boards of medical survey in any case and that the findings and recommendations of such boards are nullified and rendered invalid."

93 Notwithstanding the recommendation of the board, the Secretary made an order in part, as follows: "Having been found physically unfit for active duty in the U. S. Naval Reserve Force by the board of medical survey before which you appeared on October 14, 1919, the Secretary of the Navy has directed that you be ordered to your home and be released from all active duty." The Secretary then forwarded to the Chief of the Bureau of Navigation the report of the board of medical survey with directions as follows: "The recommendation of the board of medical survey in this case is not approved. In accordance with the recommendation of the Surgeon General, as set forth in the third endorsement, it is directed that this officer be ordered to proceed to his home and be released from active duty." Pursuant to this order, the Bureau of Navigation on November 1, 1919, issued an order in part as follows: "You are hereby detached from such duty as may have been assigned you; will proceed to your home and regard yourself honorably discharged from active service in the Navy."

It is contended by the plaintiff that before he could be discharged from the service he was entitled to have his case considered by a Navy Retiring Board to determine the nature of his disability and his right to retirement pay. Plaintiff, accordingly, communicated with the Secretary of the Navy, requesting that his case be referred to a retiring board for consideration, to which the Secretary on November 15, 1919, replied denying the right of plaintiff to have his case so considered, and also his right to be placed upon the retired list.

Judgment was entered upon demurrer to the answer, defendant refusing to further plead. From the order granting the writ, the Secretary appealed.

In the matter of retirement, officers of the Naval Reserve Corps are entitled, by law, to all the rights of officers of the regular Navy. "All officers of the Naval Reserve Force and temporary officers

94 of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the regular Navy who have incurred physical disability in line of duty." (41 Stat. 834.)

Plaintiff, having been found by the medical board to have sustained his disabilities in line of duty, became entitled to avail himself of the provisions of section 1455, R. S., as follows: "No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Navy Retiring Board, if he shall demand it." It will be observed that this provision of the statute meets both orders issued in this case. The order of the Secretary, retired plaintiff from active service, and the order of the Bureau of Navigation retired him from the service by general discharge. Plaintiff has placed himself within the full protection of the statute by communicating a request to the Secretary of the Navy to be permitted to appear before a retiring board, which request the Secretary by letter denied, without having referred it to the President for his approval or disapproval as required by section 1448, Revised Statutes.

It is clear under existing law that plaintiff, having made proper demand upon the Secretary, could not be retired from active service or discharged without a hearing before a retiring board. It follows, therefore, that the order of the Secretary, retiring plaintiff from active service, and the order of the Navigation Board made in pursuance thereof, discharging him, are void and without authority of law. The provisions of the statutes are too plain and positive to leave room either for the exercise of discretion on the part of the Secretary or for a reasonable difference of opinion as to the construction to be placed thereon. Mandamus will, therefore, lie to correct the wrong inflicted upon the plaintiff and to compel the vacation of the orders. This will, of course, operate to reinstate

95 plaintiff to his full standing as a Naval Reserve Officer.

This brings us to a consideration of section 1448, R. S., which among other things provides: "Whenever any officer, on being ordered to perform the duties appropriate to his commission, reports himself unable to comply with such order, or whenever, in the judgment of the President, an officer is incapacitated to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer" to a Navy Retiring Board. This prescribes a preliminary step necessary to be taken by any incapacitated officer in order to have his case considered by a retiring board; and while it is clear that under the provisions of this section of the statutes, an officer cannot even upon demand compel a hearing before a retiring board until such hearing is directed by the President, it is equally clear from the provisions of section 1455, supra, that no officer can be retired from active service or discharged until a hearing before a retiring board has been accorded him. It follows, therefore, that should the President,

believing the officer not to be incapacitated, refuse to direct such hearing, the officer will still remain in the service from which he cannot be removed until a hearing is accorded him.

The Secretary of the Navy has only limited jurisdiction in the matter of the retirement or discharge of officers from the Navy. He is not only without authority to exercise such power until an officer has been accorded a hearing before a retiring board, but he is likewise without authority, when such hearing has been accorded, until his recommendations upon the findings of the board have been approved by the President. R. S., section 1452.

It is not within the jurisdiction of the court to control the administrative or executive discretion of the President, or to control his action in carrying out the provisions of section 1448, supra. Weeks, Secretary of War, vs. Creary, 51 App. D. C., —; —, Fed. —.

96 It will be assumed, however, that if the President finds that plaintiff is incapacitated, as found by the medical board, he will approve plaintiff's request to the Secretary and direct the Secretary to refer the case to a Navy Retiring Board, as by law provided.

It follows, therefore, that the court below went too far in directing the Secretary of the Navy to accord plaintiff a hearing before a retiring board. It is, therefore ordered that the judgment be modified to that extent, and that as so modified it be affirmed with costs.

Modified and affirmed.

97 *Judgment.*

MONDAY, *March 6th, A. D. 1922.*

In Court of Appeals of District of Columbia.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, modified as expressed in the opinion of this court, and as so modified affirmed with costs.

Per Mr. Justice VAN ORSDEL.

MARCH 6, 1922.

98 In the Court of Appeals of the District of Columbia.

Petition for writ of error.

(Filed Apr. 13, 1922.)

Now comes the appellant, Edwin Denby, Secretary of the Navy of the United States of America, and prays the allowance of a writ of

error in the above-entitled cause from the Supreme Court of the United States under the provisions of section 250 of an act of Congress entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, in that:

1. In this case the validity of an authority exercised under the United States and the existence and scope of a power or duty of an officer of the United States is drawn in question.

2. In this case the construction of a law of the United States is drawn in question by the defendant.

And appellant further prays that the mandate issued herein be recalled and stayed pending the determination of this case in the Supreme Court of the United States.

PEYTON GORDON,
Attorney of the United States in and for the District of Columbia.

100 In the Court of Appeals of the District of Columbia.

SATURDAY, *April 22nd, A. D. 1922.*

Order allowing writ of error, etc.

On consideration of the motion for the allowance of a writ of error to remove the above-entitled cause to the Supreme Court of the United States, and to recall and stay the mandate, it is ordered by the court that the writ issue as prayed, and that the mandate be recalled and stayed until further order.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the Justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Edwin Denby, Secretary of the Navy of the United States of America, appellant, and George A. Berry, appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command yau, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable William H. Taft, Chief Justice of the United States, the 22nd day of April, in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

Citation and service.

UNITED STATES OF AMERICA, *ss:*

To George A. Berry, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Edwin Denby, Secretary of the Navy of the United States of America, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 22d day of April, in the year of our Lord one thousand nine hundred and twenty-two.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged

DAN THEW WRIGHT,
Counsel for Defendant in Error.

April 24, 1922.

103 In the Court of Appeals of the District of Columbia.

Assignment of errors.

(Filed May 5, 1922.)

Now comes the appellant—plaintiff in error—Edwin Denby, Secretary of the Navy of the United States of America, and assigns as error in the above-entitled cause the following:

1. That the court erred in holding that the demurrer to the answer of the respondent filed in the above-entitled cause should be sustained.

2. That the court erred in not holding that the said demurrer to said answer of the respondent should be overruled, and the petition of the appellee—defendant in error—dismissed.

3. That the court erred in affirming the judgment of the Supreme Court of the District of Columbia awarding a writ of mandamus commanding the appellant—plaintiff in error— to revoke and rescind his order of date November 12, 1919, referred to in paragraph 8 of said answer.

104 4. That the court erred in holding that in the matter of retirement officers of the Naval Reserve Corps are entitled by law to all the rights of officers of the regular Navy.

5. That the court erred in holding that, appellee—defendant in error—having been found by a board of medical survey to have sustained his disabilities in line of duty, becomes entitled to avail himself of the provisions of section 1455, Revised Statutes of the United States, as follows: "No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Naval Retiring Board, if he shall demand it."

6. That the court erred in holding that appellee—defendant in error—has placed himself within the full protection of said section 1455 of the Revised Statutes of the United States by communicating a request to the Secretary of the Navy to be permitted to appear before a Naval Retiring Board.

7. That the court erred in holding that the order of the Secretary of the Navy directing that the appellee—defendant in error—be placed on inactive duty, and the order of the Bureau of Navigation of the Navy Department made in pursuance thereof releasing him from said active duty, are void and without authority of law.

8. That the court erred in holding that mandamus will lie to compel the vacation of the orders mentioned in the preceding assignment of error.

105 9. That the court erred in holding that the vacation of the aforementioned orders will operate to reinstate appellee to his full standing as a Naval Reserve officer.

10. That the court erred in holding that, should the President, believing the appellee—defendant in error—not to be incapacitated, refuse to direct that he be given a hearing before a Naval Retiring Board, said appellee—defendant in error—will still remain in the service, from which he can not be removed until a hearing is accorded him.

11. That the court erred in not holding that the appellant—plaintiff in error—is authorized under existing law, in his discretion, to release appellee—defendant in error—from active duty in the Naval Reserve Force and to transfer him to an inactive-duty status in said Naval Reserve Force.

PEYTON GORDON,
Attorney of the United States in and for the District of Columbia.

106

107 *Clerk's certificate.*

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foreging printed and typewritten pages, numbered from 1 to 106, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Edwin Denby, Secretary of the Navy of the United States of America, appellant, vs. George A. Berry, No. 3541, January term, 1922, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 5th day of May, A. D. 1922.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Endorsed on cover:) File No. 28932. District of Columbia, Court of Appeals. Term No. 392. Edwin Denby, Secretary of the Navy of the United States of America, plaintiff in error, vs. George A. Berry. Filed May 17th, 1922. File No. 28932.

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AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

EDWIN DENBY, Secretary of the Navy of the United States of America,
Plaintiff in Error;

vs.

GEORGE A. BERRY,
Defendant in Error,

No. 392

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANT IN ERROR

The case is here on Writ of Error to the Court of Appeals of the District of Columbia, to review a judgment of that Court modifying and affirming a judgment of the Supreme Court of the District of Columbia sustaining a Demurrer to an Amended Answer, and awarding a Writ of Mandamus against the Secretary of the Navy.

The judgment of the Trial Court appears on Record 46; that of the Court of Appeals on Record 51.

The judgment of the Trial Court (modified on appeal) required the Secretary of the Navy to do two things:

A. To rescind a void order of November 12, 1919, which discharged Berry, a disabled Naval officer, from the Navy;

and

B. To refer Berry's case to, and to permit him to appear before a Naval Retiring Board for its action upon the question of his retirement with pay;—

The judgment of the Court of Appeals modified the judgment of the Trial Court by eliminating the "B" part of the Trial Court's order, and awarded a mandamus requiring only the rescission of the void order which undertook to discharge Berry from the Navy without pay and without determining his right to retirement.

STATEMENT OF CASE

The judgment below having been rendered upon Demurrer, the facts are expected to be taken from the pleading demurred to and not from a hysterical hypothesis conceived in the Plaintiff in Error's brief. A stipulation which the parties agreed the

Court should consider in ruling upon the Demurrer, states some of the facts, and these are particularly illuminating and entertaining. (R. 43.)

The plaintiff having filed in the Trial Court his petition and amended petition, the respondent filed an amended answer, the demurrer was to the amended answer and the stipulation; the respondent stood upon his amended answer, declining further amendment, and the judgment went against him. He cannot hope to amend now, by substituting for the pleading demurred to, even a convulsive brief.

The pleadings showed that Berry had enrolled as a member of the United States Naval Reserve Force for service in the war with Germany, was assigned to active sea duty as Lieutenant Commander in the Navy, and in the line of active duty as such officer suffered permanent physical disabilities which rendered him unfit for service (paralysis), and which under the statutory law of the United States entitled him to retirement with pay for the rest of his life, as well as to certain other privileges and emoluments pertaining to retirement .

Appellant's brief quite misses the case.

The relief awarded below was rather of a negative nature; it required the Respondent to rescind an illegal and void order which he had issued; an order which prevented the operation in the Navy of statutes which Congress had enacted for the express government of that department. The question arose in the following manner:

Certain acts of Congress gave to members of the Naval Reserve Force who had been permanently disabled in active service in the late war, the right to be retired on two-thirds' pay; in the face of which statutes and against the protests of his legal advisor the Judge Advocate General (R. 8-9), the Secretary of the Navy issued a general order in October, 1919, that such disabled officers should *not be retired, but should all be discharged* out of the Navy without pay. This is the order of October 29 (R. 2); and this order he enforced against the Appellee; the Appellee, who had been duly found permanently disabled (paralyzed), and recommended for retirement by lawful Naval Boards which were the authority exclusively clothed by law with the power to determine the question. The general order of October 29, was applied to Commander Berry, by specific individual orders of discharge, directed to him in person. (R. 35-36. R. 39.)

The statutes provided:

> "No member of the Naval Reserve Force shall be eligible for retirement other than for physical disability in line of duty." (40 Stat. 710.)

and

> "All officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter

incur physical disability in the line of duty *shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy* who have incurred physical disability in line of duty." (41 Stat. 834.)

"All members of the Naval Reserve Force shall, when actively employed as set forth in this act, be entitled to the same pay, allowances, gratuities, *and other emoluments* as officers and enlisted men of the Naval service on active duty by corresponding rank or rating and of the same length of service." (Section 19, 39 Stat. 588.)

"Sec. 1455. No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Navy Retiring Board, if he shall demand it, except in cases where he may be retired by the President at his own request, or on account of age or length of service, or on account of his failure to be recommended by an examining board for promotion."

The Secretary's order of October 29 was (R.2):

"1. Hereafter when any temporary officer not holding a permanent status in the United States Navy or United States Marine Corps, or any officer in the Naval Reserve Force or Marine Corps Reserve is

found physically disabled in line of duty by a report of a medical survey, such officer *shall not* hereafter be recommended to appear before a retiring board.

"2. When the officer is a temporary officer not holding a permanent status in the United States Navy or United States Marine Corps, and is found by a board of medical survey to be unfit for further service, the recommendation shall be that his appointment be revoked *or that he be discharged.*

"3. When the officer is an officer in the Naval Reserve Force or Marine Corps Reserve and is found by a board of medical survey to be unfit for further service he shall be placed on inactive duty," etc., etc.

In the face of the foregoing and other mandatory status upon the subject; against the written opinion and horrified protest of the Judge Advocate General of the Navy, who was his legal advisor, and that of the Navy Department (R. S. 41), the Secretary insisted upon enforcing his unwarranted and illegal *ipse dixit;* and although the Petitioner below had been found by the appropriate investigating boards of the Navy to have been permanently disabled in active service, nevertheless the Secretary personally prevented the Petitioner's appearance before a Retiring Board, ordered his discharge, and admits it in his an-

swer (R. 36). A Retiring Board is the authority exclusively vested by statute with the power to examine into the existence of the right of retirement, and to report thereon to the President for his action in individual cases. No authority save the President can actually retire an officer.

The mandamus awarded was not at all designed to require the Secretary to retire the Petitioner; the Petitioner fully understands that the Secretary is without power to, and cannot retire him; he also undertands that the Secretary cannot prevent his retirement, if the laws of his country in whose service he was disabled, give him that right.

The mandamus awarded by the Court of Appeals requires the Secretary to rescind his void and illegal *ipse dixit*, and permit the law of the land to operate in the Navy Department as it does elsewhere.

It is settled that Departmental Regulations made by virtue of a statute have the force of statutes in the government of the affairs of the Department for which they have been created; not only have such Regulations the force of law, but the Courts of the United States take judicial notice of them without proof.

Caha vs. The United States, 152 U. S. 211.

Rio Grande Company vs. Gildersleeve, 174 U. S. 609.

Appellant's brief announces the question to be:

> "The importance of this case lies in the fact that a Court has for the first time in the history of this country assumed jurisdiction to review a military order issued by the Secretary of the Navy to one of his subordinates in the military service and to direct that such order be revoked and rescinded."

There is no such question; there never was; such an extravagance of hysterics has not occurred to the Court of Appeals nor to any other Court, nor to the Petitioner, nor to any one else until its birth in the Appellant's brief.

The question is, "May the head of a Governmental department nullify acts of Congress, and when he undertakes it, is he immune from control by the courts?"

The Petitioner does not claim that the Secretary of the Navy must retire him, and no such order was issued or contemplated by the Court below; the Petitioner understands that under the law of the land, and the Regulations of the Navy Department, a Naval Retiring Board is the only authority which has the power to recommend him to the President for retirement, and he understands that no court can control the discretion of the President should he decline to approve the recommendation of the Board.

ARGUMENT

In its last analysis the question in the case is:

> "When statutes give Naval Reserve officers who have been permanently disabled in active duty, the right to retirement on two-thirds' pay, and provide that they cannot be discharged until a Retiring Board has considered their case, has the Secretary of the Navy the power to issue a general order that no such disabled officers shall be retired, but *shall all* be discharged without a hearing by the Board; and has he the power in individual cases to enforce that general order by personally discharging such officers from the Navy, and personally preventing their appearance before a Retiring Board?"

In determining the question, both Statutes and the Regulations of the Navy are to be considered; they will be examined in the following order:

1. Statutes pertaining to retirement.
2. Statutes rendering Naval Reserve officers eligible for retirement.
3. The Regulations of the Navy fixing the procedure for retirement cases.

1. STATUTES PERTAINING TO RETIREMENT

Before the Naval Reserve Force was created, R. S. Section 1448 provided and still provides for

Retiring Boards for the regular Navy; and R. S. Sections 1449, 1450, 1451, and 1452 define their powers and authority; there being no Naval Reserve Force at the time of the enactment of Section 1448, it, of course, originally contemplated only officers of the Regular Navy. Section 1448 particularly provided how certain classes of those officers may sometimes find themselves before a Retiring Board, but makes no reference to the manner in or procedure by which other classes of officers shall arrive before that tribunal although eligible to be retired; the section provides specifically for but two classes of cases: those of,

(a) An officer who being ordered to perform duty reports himself unable to comply.

(b) An officer who in the judgment of the President is incapacitated to perform his duty.

All other cases are ex necessitate left to the routine established by "Regulations of the Navy."

In either of those specified cases, the President may (at his discretion) direct the Secretary of the Navy to refer the case of such officers to a Retiring Board.

As for the other multitudinous instances, it is not conceivable that the President shall have or can be expected to acquire, personal knowledge of the thousands of cases appropriate to go to Retiring Boards so that he may order them there, or that he personally should be burdened with making an individual investigation and an order in each of the multitude of such cases; therefore, the procedure appropriate to bring all other classes of

officers before a Retiring Board is not provided for by this statute, and is not at the initiative of the President; but is provided for by the "Regulations" of the Navy Department. Under these Regulations, the proceeding is quite appropriately inaugurated by that particular authority in the service, who in the nature of things, has knowledge of the physical condition of the officer concerned; this authority is naturally the Senior Officer in local command.

The Regulations of the Navy exist under the authority of R. S. 1547, which provides:

> "The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted *with the approval of the President*, shall be recognized as the regulations of the Navy subject to alterations *adopted in the same manner*.

It will presently be observed that the statute expressly withholds from the Secretary of the Navy all discretion whatsoever with respect to the execution of the recommendations of Retiring Boards. R. S. Section 1449 vests in Retiring Boards, and not in the Secretary, authority "to inquire into and determine the facts touching the nature and occasion of the disability of any such officers;" R. S. Section 1451 requires the Retiring Board which finds an officer incapacitated for ac-

tive service, to "also find and report the cause which in its judgment produced his incapacity and whether such cause is an incident of the service;" Section 1452 provides, "a record of the proceedings and decision of the Board in each case shall be transmitted to the Secretary of the Navy and *shall be laid by him before the President for his approval* or disapproval, or orders in the case." R. S. Section 1453 requires that when a Retiring Board finds that an officer is incapacitated and that his incapacity is the result of an incident of the service "*such officer shall, if said decision is approved by the President,* be retired from active service with retired pay—;". The full text of these sections follows.

> "Revised Stat. Sec. 1448. Whenever any officer, on being ordered to perform the duties appropriate to his commission, reports himself unable to comply with such order, or whenever, in the judgment of the President, an officer is incapacitated to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer to a board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be members of the Medical Corps of the Navy. Said board, except the officers taken from the Medical Corps, shall be composed, as far as may be, of seniors

in rank to the officer whose disability is inquired of.

"R. S. Sec. 1449. Said Retiring Board shall be authorized to inquire into and determine the facts touching the nature and occasion of the disability of any such officer, and shall have such powers of a court-martial and of a court of inquiry, as may be necessary.

"R. S. Sec. 1450. The members of said board shall be sworn in each case to discharge their duties honestly and impartially.

"R. S. Sec. 1451. When said Retiring Board finds an officer incapacitated for active service, it shall also find and report the cause which, in its judgment, produced his incapacity, and whether such cause is an incident of the service.

"R. S. Sec. 1452. A record of the proceedings and decision of the board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval, or orders in the case.

"R. S. Sec. 1453. When a Retiring Board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay, as allowed by Chapter 8 of this Title.

"R. S. Sec. 1454. When said board finds that an officer is incapacitated for active service and that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough pay, or wholly retired from service with one year's pay, as the President may determine.

"R. S. Section 1455. No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Navy Retiring Board, if he shall demand it, except in cases where he may be retired by the President at his own request, or on account of age or length of service, or on account of his failure to be recommended by an examining board for promotion."

So that it is plain that the Retiring Board created by statute is the only authority constituted to inquire into and to determine the nature and occasion of the disability of an officer. If the Retiring Board finds him disabled in active service, and so reports with the recommendation that he be retired, the Secretary of the Navy has neither discretion nor choice in the matter, but must, by the commands of a mandatory statute (Section 1452), "lay the decision of the Retiring Board before the President" for the President's action; and if he, the President, approves that finding, the

right to retirement and retirement itself with pay has become fixed and absolute: if the President disapproves, the business is ended.

2. RIGHT OF NAVAL RESERVE OFFICERS TO RETIREMENT

The statutes which deal with this right forNaval Reserve officers are of two classes, both indirect and specific; the specific statutes are two acts of Congress, one of July 1, 1918, (40 Stat. 710):

> "That no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty."

The other specific statute is that of June, 1920 (41 Stat. 834): *Enacted after Berry's case came before the department and with direct reference to it.* (R. 454.)

> "That all officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty."

These two specific Acts were observed by the court below at the time of the rendition of judgment.

The indirect Acts upon the subject are as follows:

Act of Congress August 29, 1916 (39 Stat. 588), Section 20, which provides that members of the Naval Reserve Corps "may be required to perform active service in the Navy in war time;" Section 4 of the same Act providing that they may be ordered into active service by the President in time of war; the Act of July 5, 1918, Chapter 114, 40 Stat., providing that when in the active service they "shall be subject to the laws, regulations, and orders for the Government of the Regular Navy;" Section 19 of the Act (39 Stat. 588) provides in addition:

> "All members of the Naval Reserve Force shall, when actively employed as set forth in this act, be entitled to the same pay, allowances, gratuities, *and other emoluments* as officers and enlisted men of the Naval service on active duty of corresponding rank or rating and of the same length of service."

These particular statutes are now appended *in haec verba.*

> **"Active service in time of war**—Enrolled members of the Naval Reserve Force may,

in time of war or national emergency, be required to perform active service in the Navy throughout the war or until the national emergency ceases to exist."

(39 Stat. 588, Sec. 20.)

"**Ordering Into Active Service**—Members of the Naval Reserve Force may be ordered into active service in the Navy by the President in time of war or when, in his opinion, a national emergency exists."

(39 Stat. 588, Sec. 4.)

"**Pay in Active Service**—All members of the Naval Reserve Force shall, when actively employed as set forth in this Act, be entitled to the same pay, allowances, *gratuities, and other emoluments as officers and enlisted men of the Naval service on active duty* of corresponding rank or rating and of the same length of service. When not actively employed in the Navy, members of the Naval Reserve Force shall not be entitled to any pay, bounty, gratuity, or pension except as expressly provided for members of the Naval Reserve Force by the provisions of this Act."

(39 Stat. 588, Sec. 19.)

"**Subjection to Navy Regulations; Uniform**—Enrolled members of the Naval Reserve Force when in active service shall be

subject to the laws, regulations, and orders for the government of the Regular Navy, and the Secretary of the Navy may, in his discretion, permit the members of the Naval Reserve Force to wear the uniform of their respective ranks, grades, or ratings while not in active service, and such members shall, for any act committed by them while wearing the uniform of their respective ranks, grades, or ratings, be subject to the laws, regulations and orders for the government of the Regular Navy."

(40 Stat. Chapter 114, July 1, 1918.)

With the foregoing laws upon the book, the Legal Advisors of the Navy Department, of course strove to give them effect; and a number of the officers of the Naval Reserve Force who had incurred physical disability in active duty *had been actually retired prior to October 29, 1919, the day on which the Secretary's order abrogating the statute was promulgated* (R. 8-38). When the secretary by his order of October 29, undertook to remove the Navy Department from beyond the operation of the law of the land as enacted for that department, the Judge Advocate General of the Navy who by law is his legal advisor, by written opinion informed him that his order of October 29 is "Contrary to law and will result in litigation against the United States which can not be successfully defended." The Judge Advocate General further advised the Secretary as follows (R. 8-9):

"The laws relating to the retirement of temporary and Reserve officers do not prescribe what system shall be followed in ascertaining the fact that an officer is incapacitated in line of duty. Under the order you have issued this fact is to be ascertained and reported on by a board of medical survey, and the case is not to be referred to a Retiring Board. Reference to a Retiring Board is not necessary under the law; the report of a board of medical survey may sufficiently establish the facts necessary for retirement. No matter how the fact is established, when it has once been officially ascertained and made of record in the Navy Department that an officer of the temporary Navy or Reserve Force is disabled in line of duty his right to retirement under the law is fully established. The laws relating to officers of the temporary Naval Reserve Force and Marine Corps Reserve plainly confer upon those officers the same rights of retirement for physical disability in line of duty as are given by law to officers of the permanent Navy and Marine Corps. They have been so construed by the Department, and this construction has been acted upon in specific cases. When the officers who are deprived of their right to retirement under the above-mentioned order institute legal proceedings, as they naturally will,

> it will become the duty of this office on the part of the Navy Department and of the Attorney General as counsel for the Government in the courts, to defend the action required by said order. It is my opinion as above stated that such action can not successfully be defended."

Finding himself alone in the assumption that the statutory law enacted for its government need not operate in the Navy Department; alone in the assumption that none of its officers had any rights which his *ipse dixit* might not deny them, the Secretary sought solace upon the subject from Congress, in a letter which appears upon pages 43-45 of the record, and which letter the parties stipulated that the Court should consider in ruling upon the demurrer to the respondent's answer; this letter, after reviewing certain phases of the situation, conveyed to Congress the following:

> "Feeling uncertain as to the intent of Congress in this matter, I believe it advisable that the question be submitted to Congress for determination by means of a bill which will either affirm in no doubtful terms the provisions of the act of July 1, 1918, or provide that officers of the Naval Reserve Force shall not hereafter be placed on the retired list.
>
> "I have therefore to recommend that if

your committee is favorable to the retirement of these officers the following provision be enacted:

"That all officers of the Naval Reserve Force who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty.

"If, on the other hand, your committee is not favorable to the retirement of said officers, it is recommended that the following provision be enacted:

"That no officer of the Naval Reserve Force shall be eligible for retirement on account of physical disability incurred in line of duty."

And Congress, as promptly as it could, upheld the Judge Advocate General, overruled the Secretary, and enacted the first of the two suggestions, in the very words advanced by him as decisive; thus affirming in explicit and unmistakable terms the right and eligibility of Naval Reserve officers to retirement; t[illegible] is [illegible]he act of June 20, 1920 (41 St. 834). In t[illegible]e of all of which we have the Plaintiff in Error still reiterating that the disabled officers of the Naval Reserve have no rights in the matter of retirement which HE cannot personally annul; none which do not depend upon his favor; none which the Courts of the United States have

any authority to enforce, or to require him to respect.

NAVAL REGULATIONS ON THE SUBJECT OF RETIREMENT

As above suggested, the procedure for the accomplishment of Retirement is not provided for by the statute in all the cases of officers because the President cannot have knowledge of all. The very great majority are retired according to the routine of procedure established by the "Regulations of the Navy," which as heretofore suggested have the force of law until they are changed *with the approval of the President* as to such changes. In examining the Regulations of the Navy it will be observed that reference is made therein to certain "Bureaus " and it is well to understand that these several Bureaus are statutory creations of Section 419 R. S. Amongst them are the Bureau of Medicine and Surgery, and the Bureau of Navigation. The procedure contemplated by the Regulations is a survey, medical in its nature, and a report and recommendation after the survey to be made by the Medical Board which has conducted it. The regulations (as will presently be seen) provide that a survey may be ordered by the officer in local command; that the survey shall be made by a Board of Medical Survey of the Navy, and its findings reported to the officer who convened the board, for transmission to the Bureau of Medicine and Surgery; when the recommendation of the

Board of Medical Survey is that the officer surveyed be retired, the Bureau of Medicine and Surgery transmits the report to the Bureau of Navigation for submission to a Retiring Board; and if after the investigation and hearing provided for by the statute the Retiring Board recommends retirement, then as above pointed out the Secretary of the Navy has no discretion in the matter, but is required by R. S. 1452 to "lay the matter before the President for his approval." Let the regulations speak for themselves, they are as follows:

Regulation 361:

> "A survey may be ordered by the commander in chief of a fleet, the commandant of a station, the senior officer present, or by a division commander in a fleet, upon any officer or other person under his command, on the request of the senior medical officer of the ship or station where the person is serving."

Regulation 364:

> (1) "Reports of medical survey shall be made in accordance with the prescribed form. A definite opinion as to the origin of disease or injury shall be given, and a statement made in every case of all facts and circumstances connecting the disease or injury with the performance of duty or exposure incident thereto. When no unfit-

ness is found it will be sufficient to state the fact. When unfitness is found, and is regarded as temporary, the phrase 'unfit for duty,' shall be used; when permanent, the expression, 'unfit for service,' shall be employed. The common name of the disease shall be used. Under the head of 'Recommendation,' shall be given the contemplated disposition of the patient. (Art. R. 2902.) Whenever an enlisted man is sent to an insane asylum the next of kin shall be notified.

(2). "In the case of an officer, the recommendation may be detachment either with sick leave or for hospital treatment; or, if the unfitness is judged to be temporary, the officer may be recommended for hospital treatment, with a view to his return to the station. *If the disability be deemed permanent, it may be recommended that he be ordered before a Retiring Board.*"

(3)."Enlisted men shall be recommended to be sent to hospital for treatment, or to be discharged."

Regulation 365:

(1). "When a person surveyed within the United States or the waters thereof or contiguous thereto, including the Caribbean Sea and adjacent waters, is reported unfit for duty, and the report of the survey is

approved by the officer ordering it, *the recommendation of the board as approved shall be carried out as soon as practicable, except in cases involving discharge, travel, leave or retirement, which shall be referred to the department.* At training stations and on receiving ships the cases of recruits who are surveyed by boards of medical survey, shall be acted upon by the senior officer present, and the medical surveys, with report of action, shall be sent direct to the Bureau of Navigation.

(2). "Final action upon medical surveys held outside of the limits defined in the preceding paragraph, shall be taken by the senior officer present, except in cases of the retirement of officers or the discharge of persons enlisted in the United States. *The reports of medical surveys shall be forwarded direct to the Bureau of Medicine and Surgery for further transmission to the Bureau of Navigation.*"

Regulation 331, sub-division 5:

(5). "*When any officer on the active list becomes physically incapacitated to perform the duties of his office, and the probable future duration of such incapacity is permanent or indefinite, he will immediately be ordered before a retiring board,* and pending final action upon the question

> of his retirement will not be examined for promotion. The foregoing shall not apply to the case of an officer whose physical incapacity develops after he has become due for promotion, and who may under such circumstances be examined physically, by a board of medical examiners, before being ordered before a retiring board."

It savors of the ridiculous to assume or to contend that the Secretary of the Navy can have such a personal knowledge of the ramifying details of the various physical ailments and injuries which beset the thousands of Naval officers, which would qualify or enable him to judge their cases; it is equally absurd to contend that Congress intended to impose such interminable and bottomless details upon the Secretary of the Navy in person; in the very nature of things, the Secretary could not have such personal knowledge from day to day of the physical condition of all the officers in either the Atlantic, Pacific or any other fleet, to say nothing of the numerous officers detailed to local duty upon ships stationed in distant foreign ports. The necessities of the situation require that proceedings for retirement for disability incurred in active service shall be by some system, and instituted by the officer in local command wherever that may be, who has observation of the case, and that the survey by the Board of Medical Survey shall be had at that place, where the officer concerned is able to present himself.

Inasmuch as retirement inevitably involves the President's approval of the recommendation of a Retiring Board, such recommendation, as the result of surveys wherever made, must of necessity arrive at Washington for the President's action; and hence the provision in Regulation No. 365, that when.

> "the report of the survey is approved by the officer ordering it, the recommendation of the Board as approved shall be carried out as soon as practicable, except in cases involving discharge, travel, leave or retirement, which shall be referred to the Department.

Can it be successfully claimed by the Appellant that under the mandatory provisions of this particular Regulation he has any authority to override or nullify the report of the survey when it is approved by the officer ordering it? The Regulation is mandatory that the recommendation *shall* be carried out except in certain cases one of which is retirement; and this is to be referred to the Department: "Forwarded direct to the Bureau of Medicine and Surgery *for further transmission to the Bureau of Navigation.*" (Reg. 365.) Regulation 331, sub-division 5, determines what shall be done with the case when it has arrived at the Department. Says Regulation 365, "The reports of Medical Surveys shall be forwarded direct to the Bureau of Medicine and Sur-

gery for further transmission to the Bureau of Navigation." Then, says Regulation 331, sub-division 5, "When any officer on the active list becomes physically incapacitated to perform the duties of his office and the probable duration of which incapacity is permanent or indefinite, *he will immediately be ordered before a Retiring Board.*"

The foregoing, therefore, is the routine of procedure established under authority of law whereby when the right to retirement is claimed by a disabled officer, the existence of the ground upon which he claims it are ascertained; the Regulations themselves take his case before a Retiring Board when the Board of Medical Survey has so recommended and that recommendation is approved by the officer who ordered the survey; the Retiring Board then discharges the duty imposed upon it by statute of which a mandate is (R. S. Section 1449-1450), "to inquire into and determine the facts touching the nature and occasion of the disability of any such officers." That the duties of the Retiring Board will be faithfully and honorably performed is assured by the requirement of Section 1448, that the Board shall consist of not more than nine or not less than five members, two-fifths of whom shall be of the Medical Corps of the Navy, and that three-fifths of the Board shall be composed of officers of senior rank to him whose disability is to be inquired of; and further insured by the requirement of Section 1450, "That the members of said Board shall be sworn in each case to discharge their duty honestly and impartially."

FACTS OF THE CASE AT BAR.

The case of the Petitioner from its inception progressed in exact accordance with the statutes and regulations upon the subject until the time arrived according to that procedure for its submission to a Retiring Board; and thereupon by the illegal intrusion of the Secretary, he was prevented from appearing before a Retiring Board, and ordered to be discharged. The record shows (R. 6) that in the Petitioner's case:

> "The existence of such disability has been ascertained and found to exist by a Board of Medical Survey of the Navy Department of the United States duly and lawfully constituted and acting according to law; the said Board further found that by reason of the said disabilities, the petitioner was 'unfit for service,' that the probable future duration of such condition was 'permanent,' and said Board in its said finding and report recommended as follows: 'That he (Petitioner) be ordered to appear before the United States Retiring Board;' the said findings and recommendations of the said Board were in writing duly announced, promulgated and reported to the Commandant of the Navy Yard, Washington, D. C., the convening officer of said Board, and who had ordered said survey, for transmission to the Bureau of Medicine and Surgery; the

said Commandant duly approved the said findings and recommendation with his signature endorsed thereon and forwarded the same to the Bureau of Medicine and Surgery."

The foregoing findings and recommendations are admitted in the answer which was demurred to (R. 33).

"Under and according to the custom of the Navy Department and the Regulations in force at the times referred to in paragraph 4 hereof, petitioner upon the findings and report of said Board of Medical Survey referred to in paragraph 4 hereof would have been ordered and permitted to appear before a Naval Retiring Board for its action, except for an order issued by the Defendant on October 29, 1919.

"The plaintiff if placed upon the retired list of the Navy will receive compensation, pay, and emoluments from the date of his retirement, all as provided by law, and of all of which he will be deprived unless he is retired.

"Defendant as Secretary of the Navy has refused to permit the petitioner to appear before, and has prevented his appearance before a Naval Retiring Board, and will continue so to do unless otherwise ordered by the Court.

"Defendant as Secretary of the Navy has prevented the Petitioner from having the question of his eligibility for retirement presented to or considered by a Naval Retiring Board, and will continue so to do unless otherwise ordered by the Court.

"Prior to and until the Act of Congress of October 6th, 1917, creating 'The Bureau of War Risk Insurance,' the Petitioner upon the existence of the disability, findings, reports and recommendations set out in paragraph 4 hereof, was thereupon entitled to appear before a Naval Retiring Board; the defendant has refused to permit petitioner to appear before, and has prevented his appearance before a Naval Retiring Board, solely for the reason that in the judgment of Defendant said Act of October 6th, 1917, deprived petitioner of eligibility for Retirement for physical disability incurred in line of duty, as shown by an official communication written to petitioner by Defendant, a copy whereof is hereto attached marked 'Exhibit b' and made part thereof.

"The Defendant as Secretary of the Navy has directed and caused and required the Bureau of Navigation of the Navy Department to issue to petitioner an order in part as follows:

" 'Having been found physically unfit for active duty in the U. S. Naval Reserve Force by the Board of Medical Survey before

which you appeared on October 14, 1919, the Secretary of the Navy has directed that you be ordered to your home and be released from all active duty.'

"The defendant, as Secretary of the Navy, will, unless prevented by the Court, cause the said order mentioned in paragraph 13 hereof to be enforced against the petitioner and will deny and deprive him of retirement and its advantages."

It will not do for the Appellant to deny the existence of statutes, or the existence of "Naval Regulations" made under the authority of a statute; he cannot make an issue of fact out of these points; the Court takes judicial notice of both the statute and the regulations and does not take his word for their existence, their contents or their meaning; the Court decides these for itself.

The general nature of the subject of these cases involving as they do many of the best young lives of the Nation who were willing to sacrifice their futures and themselves at their country's call, is illuminative upon the question of "Legislative Intent," and indicative, perhaps, of whether laws passed manifestly for their benefit are to be construed adversely to them or construed in their favor; and further illuminative upon the consideration whether it is the policy of those laws and the legislative intent of Congress to vest in any one single individual, no matter be he Secretary of the Navy, the "discretion" to select which of these

broken and ruined boys shall be accorded and which shall be denied an appearance before a Retiring Board, which is the inevitable preliminary to all chance of receiving even this pitiful reward of a grateful Nation; in the discretion of one single individual who, even be he the Secretary of the Navy, can not but lack the superhuman ability to personally acquaint himself with the details of the thousands of cases of disabled officers who now, by virtue of the extravagant order of October 29th, are cast out into the four corners of the land broken, destitute, and in many instances bedridden and helpless.

FALLACY OF THE CLAIM THAT DEFENDANT IN ERROR MUST "APPEAL" TO THE PRESIDENT FROM THE VOID ORDER DISCHARGING HIM, INSTEAD OF APPEALING TO THE COURT.

The plaintiff in error stands on the proposition that the only remedy available against a void order discharging him from the service was an Appeal by Berry from the void order of the Secretary to the President; and in support of this the brief of the plaintiff in error states:

> "When the foregoing orders were issued by the Secretary of the Navy and the Bureau of Navigation, there was then in effect a regulation issued by the Secretary of the Navy pursuant to section 161 of the Revised

Statutes (R. 36), which regulation provided that—

"'An official appeal from an order or decision of the Secretary of the Navy by an officer shall be addressed to the President as the common superior and be forwarded through the Department except in case of refusal or failure to forward, when it may be addressed directly. Similarly, an appeal from an order or decision of an immediate superior shall be addressed to the next highest common superior who has power to act in the matter, and shall be forwarded through the immediate superior, or, should the latter refuse or fail to forward it within a reasonable time, it may be forwarded direct with an explanation of such course. (Art. 5323, Naval Instructions, 1913.)'"
(Plaintiff's Brief, 5-6.)

This subtle sophistry is very dangerous to justice because unless exposed it will mislead the Court, and for this reason:—the same brief shows that "Regulations of the Navy" by virtue of R. S. 1547 have the force of statutory law;—the danger is in the likelihood that the Court will assume that the "Regulation issued by the Secretary of the Navy" as above labeled in the brief, is the same thing as a "Regulation of the Navy," and has the same legal force and effect; *whereas the two are utterly* distinct and different; the brief of the Plaintiff in

Error had no business to call this emanation from the Secretary of the Navy a "Regulation," for the writer should know it is not a "Regulation;" the very citation which they give it on page 6 of their brief shows it to be "Article 5323, *Naval Instructions*, 1913."

"*Naval Instructions*" are one thing, and "*Regulations of the Navy*" are quite a different thing. Naval instructions are instructions issued by the Secretary of the Navy *without the approval of the President*, by virtue of one section of the statutes, while "Regulations of the Navy" are regulations prepared, submitted to, and approved by the President, by virtue of another section of the statutes; and which by the terms of that very statute *cannot be altered by the Secretary without the approval of the President.*

"Naval Instructions" are issued by the Secretary of the Navy under R. S. Section 131 of a Chapter entitled, "Provisions Applicable to all the Executive Departments;" the section provides:

> "Departmental regulations—The head of each department is authorized to prescribe regulations, *not inconsistent with law*, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it." (R. S. 131.)

While "Regulations of the Navy" exist by virtue of R. S. Section 1547 of a Chapter entitled "General Provisions Relating to the Navy."

> "Regulations—The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner." (R. S. 1547.)

Thus it appears that the "Naval Instruction" relied upon by the Plaintiff in Error as requiring Berry to appeal to the President, was a mere instruction of the Secretary, "*inconsistent with law:*" inconsistent with law in that the instruction would turn an absolute statutory right which Berry possessed into a "conditional" right, by attaching to the Statute "an appeal to the President," as a condition which the Statute itself eliminates—the Statute provides:

> "No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Navy Retiring Board, if he shall demand it, * * * ."
>
> (R. S. 1455.)

and

> "That all officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty, shall be eligible for retirement under the same conditions as now provided by law for officers in the Regular Navy who have incurred physical disability in line of duty."
> (40th Statute, p. 34.)

Can the Secretary attach a condition to these statutes, which renders them operative only *conditionally?* Can he attach the condition of "an appeal from his order of discharge"?

Can the Secretary of the Navy in the face of these statutes say to Berry, "I *will* discharge you from the Navy without a hearing before a Naval Retiring Board. I will issue a 'Naval Instruction' under which these Acts of Congress shall not work unless you appeal to the President, instead of to the Courts."

AUTHORITIES CITED BY PLAINTIFF IN ERROR

The plaintiff in error relies upon Reaves vs. Ainsworth, 219 U. S. 296, French vs. Weeks, 259 U. S. 326, and Creary vs. Weeks, 259 U. S. 336.

Singularly enough, all of those cases came up from the Court of Appeals of the District of Columbia, the same court from which comes the case

at bar; and in all three of the cases the judgment of that Court was affirmed here. Is it not curious that that Court was right in all of those three cases, and having decided each of them correctly, now announces an opposite as the law for the case at Bar?

That Court has not announced the law oppositely for the case at Bar; the Court of Appeals has applied the law of those cases to the case at Bar; those very cases themselves settle the law of the case at Bar to be as applied by the Court below.

In each of those cases it was sought by mandamus to control the discretion of a statutory board to which the statute committed the power to decide the particular question;—while at Bar, the statute expressly denies to the Secretary of the Navy and all others, the power to discharge Berry before a Retiring Board had considered and passed upon his case. The syllabus of the Ainsworth case is:

> "The decision of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the Courts." 219 U. S. 296.

That of the French case is:

> "Given lawfully constituted military tribunals, with jurisdiction over person and subject-matter involved unquestioned and unquestionable, and action by them within

> the scope of the power with which they are invested by law, their decisions cannot be reviewed or set aside by the civil courts in a mandamus proceeding or otherwise."
>
> 259 U. S. 326.

And that of the Creary case is thus:

> "Given lawfully constituted military tribunals, with jurisdiction over person and subject-matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law, their decisions cannot be reviewed or set aside by the civil courts in a mandamus proceeding or otherwise."
>
> 259 U. S. 336.

Propositions which the Defendant in Error concedes, and always has; if the statute vested in the Secretary of the Navy a discretion to determine whether a permanently disabled officer could be discharged from the Navy without the submission of his case to a Retiring Board, then indeed the Defendant in Error would have to concede and accept defeat; but the statute, instead of vesting anywhere the discretion to so determine, does in terms express and mandatory, deny such discretion to all, whether tribunal or officer, and itself forecloses the question by positive statutory mandate.

AUTHORITIES WHICH SUSTAIN THE POSITION OF DEFENDANT IN ERROR

The office of Secretary of the Navy being without power or authority to discharge Berry without a hearing before a Retiring Board, the act of the incumbent of that office in undertaking so to do, was not an act of the "office," but was the personal interference by an official person with official records by intruding void and illegal orders in such wise as to deprive Berry of statutory rights so long as the unlawful orders stand.

The mandamus awarded controls a purely ministerial act concerning which the law withholds all discretion.

> "A duty enforceable by mandamus, and not one involving the exercise of judgment and discretion, was imposed upon the Secretary of the Treasury by the act of February 17, 1903 (32 Stat. at L. 1612, chap. 559), referring to him the Parish claim, under a contract to furnish ice to the government at a fixed price, to 'determine and ascertain the full amount which should have been paid' to the contractor 'if the said contract had been carried out in full, without change or default made by either of the parties,' under the ruling of the measure of damages laid down by the Federal Supreme Court, and in 'accordance with the evidence in the case collected by the Court of Claims,' and, after deter-

mining the full amount thus due, to deduct all payments, and pay over the balance to the claimant." Parish vs. MacVeagh, 214 U. S. 936.

"Mandamus will lie to compel the Secretary of the Interior to perform the purely ministerial duty to see that a patent is duly executed and delivered to an enrolled member of the Choctaw Nation, entitled to share in the allotment of tribal lands, * * * and the Secretary of the Interior could not thereafter, as he attempted to do, segregate the land for town-site purposes, as having been under urban occupancy, and cancel her allotment with leave to select other lands in lieu thereof." Ballinger vs. U. S. ex Relatione Belle Frost, 216 U. S. 464.

"Mandamus will lie in the absence of other controlling facts, to compel the Secretary of the Interior to restore to the freedmen rolls of the Creek Nation the names of those who have been arbitrarily stricken from such rolls without the notice and opportunity to be heard essential to due process of law." Turner vs. Fisher, 222 U. S. 164.

"A report by a forest officer recommending the cancelation of a homestead entry for nonresidence and lack of cultivation is not a 'pending contest or protest,' within the meaning of the Act of March 3, 1891 (26 Stat. at L. 1099 Chap. 561, Comp. Stat. 1916, par. 5113), par. 7, and hence does not

relieve the Secretary of the Interior, as head of the Land Department, of the plain duty, under that section, enforceable by mandamus, to cause a patent to be issued to a homestead entryman where two years have elapsed since the date of the receiver's receipt upon the final entry, and there is 'no pending contest or protest against the validity of such entry.' " Lane vs. Hoglund, 244 U. S. 1066.

"The pendency, when mandamus is sought, of a suit in equity brought by the United States to cancel for fraud the receiver's receipt issued on a final homestead entry, does not afford a sufficient justification to the Secretary of the Interior and the Commissioner of the General Land Office which will preclude the enforcement of their plain ministerial duty under the Act of March 3, 1891, par. 7, to pass the entry to patent, where, when two years had elapsed since the date of the receiver's receipt, there was no pending contest or protest against the validity of such entry." Payne vs. Newton, 255 U. S. 721.

CONCLUSION

The case undertaken to be presented by the Plaintiff in Error's brief, is not the case which he made for the Trial Court; although other Naval Reserve officers were retired as a matter of course

until Berry's case came up, although others have been retired since, yet the position of the Plaintiff in Error throughout has been, and still is, that law or no law, he is determined that Berry shall be discharged without pay, without retirement, and that neither a Retiring Board nor the President shall have a chance to consider his case.

In the outset, before the inauguration of the proceeding below, he committed himself in writing to the position that Berry should not have the benefit of the rights which the law of retirement gives him. Responding to Berry's request to be permitted to appear before a Retiring Board, the Secretary in November, 1919, wrote, (R. 10.)

> "In my opinion it was clearly the intent of Congress that all members of the temporary and Reserve Establishments who are found physically disabled in the line of duty by a medical survey should apply for compensation to the Bureau of War Risk Insurance, in the Treasury Department, and if compensated by that bureau, may apply to the Federal Board for Vocational Education for relief under the vocational rehabilitation act. Although not technically done, I am of the opinion that the act creating the War Risk Bureau abrogated the provisions of the act of August 29th, 1916, creating the Naval Reserve Force which served temporarily with the Navy during the war.
>
> "In view of the above it will be impracti-

> cable to place *you* on the retired list and it will be necessary for *you* to apply to the War Risk Insurance Bureau for such compensation as may be due you."

In the 4th Assignment of Error (R. 54) in the face of the positive statute upon the subject, which Congress enacted expressly to correct him, is reiterated,

> "That the Court erred in holding that in the matter of retirement officers of the Naval Reserve Corps are entitled by law to all the rights of officers of the Regular Navy."

Compare this assignment of error with the statutory law of the land; thus:

> "All officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in the line of duty *shall* be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty." (41 Stat. 834.)

The attitude today is as it was in November, 1919; although admonished of his error by the Judge Advocate General of the Navy, overruled

by Congress and the law of the land; overruled by the Courts of the Country, the same illegal attitude is still adhered to: a position which amounts to no more and to no less than this: "The law is wrong in giving Berry a case; the courts are wrong in applying the law of the land to Berry's case; let power more potent than laws, wiser than Courts, stand to the Breach."

That the judgment of the Court of Appeals should be affirmed is respectfully submitted.

DANIEL THEW WRIGHT,
PHILIP ERSHLER,
Attorneys for Defendant in Error.

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CITATIONS.

Cases—Continued.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

EDWIN DENBY, SECRETARY OF THE Navy of the United States of America, plaintiff in error,
v.
GEORGE A. BERRY.
No. 392.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the Court of Appeals of the District of Columbia to review its judgment in a mandamus proceeding instituted by one George A. Berry, defendant in error, against the Secretary of the Navy. By the judgment of the trial court it was ordered that a writ of mandamus be issued, directed to the Secretary of the Navy, commanding him—

1st. To revoke and rescind an order issued by him November 12, 1919; and

2d. To permit the defendant in error to appear before, and to refer his case to, a naval retiring board

in order that it might inquire into and determine the facts touching the nature and occasion of his disability (R. 46).

The order which the Secretary is required to revoke and rescind was issued by him over his official signature in the form of an indorsement on the report of a board of medical survey (which had recommended that the defendant in error be ordered before a naval retiring board) which order for the convenience of the court is herein designated by us as "Order A" and read as follows.

[Order A.]

> The recommendation of the board of medical survey in this case is not approved. In accordance with the recommendation of the Surgeon General, as set forth in the third indorsement, it is directed that this officer be ordered to proceed to his home and be released from active duty. (R. 35, 36.)

We are not now concerned with the second command of the proposed writ, because of the decision of the Court of Appeals (279 Fed. 317), which held:

> The court below went too far in directing the Secretary of the Navy to accord plaintiff a hearing before a retiring board. It is, therefore, ordered that the judgment be modified to that extent, and that as so modified it be affirmed with costs. (R. 51.)

The facts of the case are:

The defendant in error enrolled in the Naval Reserve Force (R. 32) for a term of four years in

accordance with an Act of Congress approved August 29, 1916 (39 Stat. 587), which Act created the Naval Reserve Force and provided that—

> The Naval Reserve Force shall be composed of citizens of the United States who, by enrolling under regulations prescribed by the Secretary of the Navy or by transfer thereto as in this Act provided, obligate themselves to serve in the Navy in time of war or during the existence of a national emergency, declared by the President * * *.
>
> Enrollment and reenrollment shall be for terms of four years * * *.

He was assigned the provisional rank of Lieutenant Commander in the Naval Reserve Force (R. 32) in accordance with the same statute, which provided that—

> When first enrolled members of the Naval Reserve Force, except those in the Fleet Naval Reserve, shall be given a provisional grade, rank or rating in accordance with their qualifications determined by examination.

He was employed on active duty in the Navy in accordance with the following provisions in the aforesaid Act of August 29, 1916:

> Members of the Naval Reserve Force may be ordered into active service in the Navy by the President in time of war or when, in his opinion, a national emergency exists. (39 Stat. 587.)
>
> Enrolled members of the Naval Reserve Force may, in time of war or national emergency, be required to perform active

> service in the Navy throughout the war or until the national emergency ceases to exist. (39 Stat. 588–589.)

While on active duty he was examined by a Board of Medical Survey at the Naval Hospital, Washington, D. C., October 14, 1919, which reported him unfit for duty and recommended that he be ordered before a naval retiring board. (R. 33.)

The report of the board was transmitted to the Bureau of Medicine and Surgery of the Navy Department for recommendation in accordance with the following regulation:

> Reports of medical surveys upon officers and enlisted men of the Navy shall be made in triplicate (through the commanding officer under whom the person surveyed is serving) to the officer ordering the survey, by whom they shall be acted on and transmitted direct to the Bureau of Medicine and Surgery for recommendation and further transmission to the Bureau of Navigation for final action. (Art. 363, Navy Regs. 1913.)

The chief of the Bureau November 11, 1919 (R. 33) disapproved the recommendation of the board (that defendant in error be ordered before a naval retiring board), and on November 12, 1919, the Secretary of the Navy forwarded the report of the board to the Bureau of Navigation, Navy Department, with the following indorsement thereon over his official signature as Secretary of the Navy (R. 35):

> [Order A.]
>
> The recommendation of the Board of Medical Survey in this case is not approved. In

> accordance with the recommendation of the Surgeon General, as set forth in the third indorsement, it is directed that this officer be ordered to proceed to his home and be *released* from *active* duty. (Italics ours.)

On November 14, 1919, the Bureau of Navigation addressed the following communication to the defendant in error (designated by us as Order B) informing him of the action which had been taken in his case (R. 39):

[Order B.]

> Having been found physically unfit for *active* duty in the United States Naval Reserve Force by the Board of Medical Survey before which you appeared on October 14, 1919, the Secretary of the Navy has directed that you be ordered to your home and be *released* from all *active* duty. (Italics ours.)

Pursuant to the Secretary's order of November 12, 1919 (Order A), the Bureau of Navigation on November 17, 1919, addressed the following order (R. 39) to the defendant in error (designated by us as Order C):

[Order C.]

> You are hereby detached from such duty as may have been assigned you; will proceed to your home and regard yourself honorably discharged from *active* service in the Navy. (Italics ours.)

When the foregoing orders were issued by the Secretary of the Navy and by the Bureau of Naviga-

tion there was then in effect a regulation issued by the Secretary of the Navy pursuant to section 161 of the Revised Statutes (R. 36), which regulation provided that—

> An official appeal from an order or decision of the Secretary of the Navy by an officer shall be addressed to the President as the common superior and be forwarded through the Department except in case of refusal or failure to forward, when it may be addressed directly. Similarly, an appeal from an order or decision of an immediate superior shall be addressed to the next highest common superior who has power to act in the matter, and shall be forwarded through the immediate superior, or, should the latter refuse or fail to forward it within a reasonable time, it may be forwarded direct with an explanation of such course. (Art. 5323, Naval Instructions, 1913.)

The Secretary of the Navy has received no appeal from the defendant in error to be forwarded to the President, nor has he refused to forward any such appeal. (R. 36.) On the contrary, ignoring the remedy provided by the foregoing regulation, he carried his military grievance to a civil court and, on November 18, 1919 (R. 1), filed in the Supreme Court of the District of Columbia his petition for mandamus against the Secretary of the Navy, praying (R. 4) that the Secretary of the Navy revoke and cancel the order of November 17, 1919 (Order C), issued by the chief of the Bureau of Navigation, who was not even made a party to the proceedings.

On February 27, 1920 (R. 5), the defendant in error, under leave to amend, filed an entirely new petition for mandamus against the Secretary of the Navy, wherein he prayed (R. 9) "that the defendant revoke and cancel the order referred to in paragraph 13 hereof"—that is, the letter (Order B) addressed by the chief of the Bureau of Navigation to the defendant in error on November 14, 1919, hereinbefore quoted, which was not the order ("C") that he sought to have canceled by his original petition.

The case, having been heard on demurrer to the Secretary's answer, judgment was rendered (R. 46), which judgment, as modified by the Court of Appeals (R. 51), requires that a writ of mandamus be issued directed to the Secretary of the Navy "commanding him to revoke and rescind his order of date of November 12, 1919, referred to in paragraph 8 of his said answer herein"—that is, Order "A." This order was issued by the Secretary of the Navy to the chief of the Bureau of Navigation directing that defendant in error be released from active duty, the revocation of which Order "A" was not prayed by the defendant in error in either his original or amended petition. In other words, in his original petition defendant in error sought to have canceled Order C; in his amended petition he sought to have canceled Order B; and the court directed the cancellation of Order A.

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ASSIGNMENTS OF ERROR.

The court erred as follows:

1. In holding that the demurrer to the answer of the respondent filed in the above-entitled cause should be sustained.

2. In not holding that the said demurrer to said answer of the respondent should be overruled, and the petition of the appellee—defendant in error—dismissed.

3. In affirming the judgment of the Supreme Court of the District of Columbia, awarding a writ of mandamus commanding the appellant—plaintiff in error—to revoke and rescind his order of date November 12, 1919, referred to in paragraph 8 of said answer.

4. In holding that in the matter of retirement, officers of the Naval Reserve Force are entitled by law to all the rights of officers of the regular Navy.

5. In holding that appellee—defendant in error—having been found by a board of medical survey to have sustained his disabilities in line of duty, becomes entitled to avail himself of the provisions of section 1455, Revised Statutes of the United States, as follows: "No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Naval Retiring Board, if he shall demand it."

6. In holding that appellee—defendant in error—has placed himself within the full protection of said section 1455 of the Revised Statutes of the United States by communicating a request to the Secretary

of the Navy to be permitted to appear before a Naval Retiring Board.

7. In holding that the order of the Secretary of the Navy directing that the appellee—defendant in error—be placed on inactive duty, and the order of the Bureau of Navigation of the Navy Department made in pursuance thereof releasing him from said active duty, are void and without authority of law.

8. In holding that mandamus will lie to compel the vacation of the orders mentioned in the preceding assignment of error.

9. In holding that the vacation of the aforementioned orders will operate to reinstate appellee to his full standing as a Naval Reserve officer.

10. In holding that, should the President, believing the appellee—defendant in error—not to be incapacitated, refuse to direct that he be given a hearing before a Naval Retiring Board, said appellee—defendant in error—will still remain in the service, from which he can not be removed until a hearing is accorded him.

11. In not holding that the appellant—plaintiff in error—is authorized under existing law, in his discretion, to release appellee—defendant in error—from active duty in the Naval Reserve Force and to transfer him to an inactive-duty status in said Naval Reserve Force.

The substance of the matters thus presented is for convenience expressed in the propositions hereinafter argued.

ARGUMENT.

POINT ONE.

An appeal to the President is the remedy of a naval officer who considers himself aggrieved by an order issued to him by the Secretary of the Navy. Where the officer does not avail himself of that remedy, but appeals to the courts for a writ of mandamus commanding the Secretary of the Navy to revoke and rescind a military order, the courts are without jurisdiction to grant such relief.

The importance of this case lies in the fact that a court has for the first time in the history of this country assumed jurisdiction to review a military order issued by the Secretary of the Navy to one of his subordinates in the military service and to direct that such order be revoked and rescinded.

Unless the judgment be reversed a precedent will be established which will be destructive of discipline, and, if generally followed, would go far to transfer the supreme command of the armed forces from the Executive to the judicial branch of the Government.

The order in this case did not differ from thousands of other orders issued at the same period in the course of demobilization after cessation of hostilities in the late war, releasing from duty in the armed forces of the United States those who had entered the service during the period of the war and whose services on active duty in the Navy were no longer required. If the courts have jurisdiction to review the order issued in this case, they must have jurisdiction to review any

and all orders issued to persons in the military service by their lawful superiors whenever the one to whom the order is issued shall consider himself aggrieved thereby; and thus this court will have the impossible burden placed upon it of having its time consumed in passing upon the legality of military orders, a situation palpably inconsistent with the very theory and practice of civil and military law. In *Reaves* v. *Ainsworth*, 219 U. S. 296, 306, the leading case on the subject, an officer of the Army sought judicial annulment of an order, issued by a subordinate officer of the War Department pursuant to an order of the Secretary of War. The order in that case discharged from the Army an officer who claimed to be entitled to retirement on account of physical disability. Mr. Justice McKenna, delivering the unanimous opinion of this court, used the following strong and convincing language:

> The courts are not the only instrumentalities of government. They can not command or regulate the Army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army. * * * If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there

> litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.

In the cases of *French* v. *Weeks*, 259 U. S. 326, and *Creary* v. *Weeks*, 259 U. S. 336, judicial relief by writ of mandamus was sought by officers of the Army against the Secretary of War to annul orders which were issued by the latter, in one case retiring the relator and in the other discharging him from the Army. In both cases it was held by this court that "the Supreme Court did not have jurisdiction to order the writ of mandamus prayed for." (Id. 336, 344.) In both cases this court cited with approval *Reaves* v. *Ainsworth*, *supra*. In the *French case*, this court also quoted with approval the following extract from *Dynes* v. *Hoover*, 20 How. 65, 82:

> If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.

In the *Creary case*, this court said:

> It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the

> classification and reduction in number of the officers of the Army, provided for in section 24b. In its nature it belongs to the executive and not to the judicial branch of the Government.

The application to the present case of the remarks last quoted is emphasized by the fact that here, as in that case, there was a statute requiring the reduction in number of officers on active duty. The enactment referred to was contained in the naval appropriation act of July 11, 1919 (41 Stat. 138), which in an effort to hasten demobilization of wartime personnel, provided, among other things, that—

> The average number of commissioned officers of the line, permanent, temporary, *and reserves on active duty*, shall not exceed during the periods aforesaid, 4 per centum of the total temporary authorized enlisted strength of the Regular and Temporary Navy, and members of the Naval Reserve Force in enlisted ratings on active duty.

Other provisions in said act intended to limit the employment of reservists on active duty included the following:

> That during the fiscal year ending June 30, 1920, no member of the Naval Reserve Force shall be recalled to active duty for training or any other purpose except as hereinbefore provided. * * *
>
> Members of the Naval Reserve Force shall not hereafter be ordered to perform active duty on shore of a kind which is ordinarily performed by civilians, and all reservists now

> performing such duty shall be relieved from such duty within thirty days after the date of approval of this Act.

The opinion in *Marbury* v. *Madison*, 1 Cranch, 137, 166, contains the following noted passages:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. * * * The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable.

To what head of a department could this language more certainly apply than to the Secretary of the Navy when acting for the President as the constitutional Commander in Chief of the Army and Navy in the issuance of orders to his military subordinates? "The Secretary of the Navy represents the President,

and exercises his power on the subjects confided to his department." (*U. S.* v. *Jones*, 18 How. 92.) "The Secretary of War"—and the same is equally true of the Secretary of the Navy—"no matter what powers he may in fact exercise in such matters, is the representative and agent of the President, whose will is executed. As was said of the duties of the Secretary of State, under analogous circumstances, in *Marbury* v. *Madison*, 'He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.'" (*Brown* v. *Root*, 18 App. D. C. 239; see also *Decatur* v. *Paulding*, 14 Pet. 497.)

Applying to the present case the language of this court in *Reaves* v. *Ainsworth*, supra, the law never intended to give the defendant in error the right to carry his contentions over the head of the President to the courts, there to be litigated through a course of years. The Navy regulation hereinbefore quoted (supra, p. 6) provides for appeals to the President from orders or decisions of the Secretary of the Navy. This right of appeal to the President has been an established practice in the Navy from a very early date. Thus by Navy Department General Order No. 178 issued by the Secretary of the Navy under date of August 5, 1872, it was provided:

> Any official question of, or appeal from, any order or action of the department, by any officer of the Navy, should be addressed to the President, as the common superior, and should be forwarded through the depart-

> ment, except in cases of refusal or failure to forward, when they may be addressed directly.

This general order was in force on June 22, 1874, when the President approved the Revised Statutes of the United States, section 1547 of which reads as follows:

> The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.

The orders and regulations which were in force when the Revised Statutes were approved by the President were thereby given the force of law. (*Ex parte Reed*, 100 U. S. 13, 22.) The above-quoted general order, with slight modifications in language, was embodied in the successive editions of the Navy Regulations, until it appeared in the Naval Instructions of 1913, in the form hereinbefore quoted (supra, p. 6).

It has been repeatedly decided that where by the regulations of a department an appeal is provided from the decision of a subordinate official, such remedy must be exhausted before an appeal to the courts. (*Lochren* v. *Long*, 6 App. D. C. 486, 506; see also *Hitchcock* v. *Bigboy*, 22 App. D. C. 275; *Brown* v. *Spelman*, 255 Fed. 863; *Women's Catholic Order of Foresters* v. *People ex rel. Minnie Keefe*, 59 Ill. App. 390; *Scammon* v. *American Gas Co.*, 160 Pac. 316.)

POINT TWO.

The order of the Secretary of the Navy did not operate to retire the defendant in error or to discharge him from the Naval Reserve Force and did not deprive him of any eligibility for retirement that he otherwise would have had.

The court below held that the Secretary's order of November 12, 1919 (Order A, supra, p. 2), operated to retire the defendant in error from active service, without a hearing before a retiring board, and was therefore illegal and in violation of section 1455 of the Revised Statutes, which section, in the opinion of the court, was extended to this case by an act approved June 4, 1920, more than six months after the aforesaid order was issued. These enactments are as follows:

> SEC. 1455. No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such naval retiring board, if he shall demand it, except in cases where he may be retired by the President at his own request, or on account of age or length of service, or on account of his failure to be recommended by an examining board for promotion.
>
> Act of June 4, 1920, 41 Stat. 834: That all officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty.

Defendant in error requested retirement by letter dated November 6, 1919 (R. 10), and the court below held that the Secretary's order of November 12, 1919 (Order A) retired him from active service without a hearing. If this were true, section 1455 was not violated, as that section entitles an officer to a hearing before a retiring board "except in cases where he may be retired by the President at his own request." In other words, the sole purpose of section 1455 is to protect from arbitrary retirement an officer who does not desire retirement, and has nothing to do with a case of this kind in which the officer sought to be retired.

In its opinion the court below stated:

> The order of the Secretary retired plaintiff from active service, and the order of the Bureau of Navigation retired him from the service by general discharge. * * *
>
> It is clear under existing law that plaintiff, having made proper demand upon the Secretary, could not be retired from active service or discharged without a hearing before a retiring board. It follows, therefore, that the order of the Secretary, retiring plaintiff from active service, and the order of the Navigation Board made in pursuance thereof, discharging him, are void and without authority of law * * * it is equally clear from the provisions of section 1455, supra, that no officer can be retired from active service or discharged until a hearing before a retiring board has been accorded to him. (R. 50.)

The error in these statements, which were the basis of the court's decision, lies in the fact that, even conceding that the laws cited applied to the case of the defendant in error, *he was neither retired from active service nor discharged* by the Secretary's order or by the order of the Bureau of Navigation issued in execution thereof; but that said orders merely operated to return him to his normal status as a member of the Naval Reserve Force subject to subsequent recall to active duty or to retirement in accordance with the law during the remainder of his four-year term of enrollment.

The precise language used in the Secretary's order was that the defendant in error "be released from active duty." A military order directing that a member of the Naval Reserve Force "be released from active duty" is susceptible of but one interpretation, namely, that he is for the time being absolved from the obligation assumed by his enrollment which, in the language of the law (Act of August 29, 1916, supra), is to "serve in the Navy in time of war or during the existence of a national emergency as declared by the President." After the execution of such an order the reservist in whose case it has been issued continues until the expiration of his term of enrollment to enjoy all the rights, benefits, and privileges and to be subject to all the liabilities prescribed by law for members of the Naval Reserve Force. Whatever rights, benefits, and privileges, whether in respect of retirement, pay, rank, or honors, including the privilege of wearing the uniform of his rank, which were possessed under the law or regulations by

any other member of the Naval Reserve Force in his normal status as a member of that organization were likewise possessed by this officer after the Secretary's order had been executed. Specifically as to the matter of retirement the Secretary's order did not in any manner whatsoever deprive the defendant in error of any right or eligibility that he possessed prior to the issuance thereof to apply for retirement or to be retired on account of physical disability which may have been incurred by him while in active service.

It has been officially decided by the Navy Department, in its published decisions (Court-Martial Order No. 268, Aug. 30, 1919, pp. 15–16), that members of the Naval Reserve Force who are physically disabled in the line of duty while on active duty with the Navy in response to the call of the President are not deprived of their eligibility for retirement on account of such disability by being subsequently released from active duty; that the law makes no distinction with respect to retirement between members on active duty and those on the inactive list. In accordance with this official interpretation of the law certain members of the Naval Reserve Force otherwise eligible for retirement have in fact been retired, both before and since this proceeding was instituted, notwithstanding that they had in the meantime been released from active duty under orders identical with those issued in this case. Accordingly, it was expressly stated in the Secretary's answer upon this point (R. 39) "that if this petitioner has any right to retirement and its advantages the aforesaid order

and its enforcement does not deprive him of such right."

The Secretary's order, in its legal effect—and we are here concerned only with its legal effect—was humane in that it temporarily released from his obligation of performing active duty in the Navy an officer who had been reported by a board of medical survey to be physically unfit for duty, while at the same time it left his status unchanged in so far as concerned his eligibility for retirement. The Secretary's order was something wholly separate and apart from the matter of retirement. That it did not retire the defendant in error, as erroneously held by the court below, is sufficiently shown by the fact that the very basis of this proceeding was the complaint of the defendant in error that the Secretary's order deprived him of his right of retirement. If the order had the effect of retiring the defendant in error, this action would never have been brought. In the amended petition (R. 7) it is specifically averred:

> The defendant, as Secretary of the Navy, will, unless prevented by the court, cause the said order mentioned in paragraph 13 hereof to be enforced against the petitioner *and will deny and deprive him of retirement and its advantages.*

In other words, the court below holds that the Secretary's order should be revoked *because it illegally retired defendant in error;* while defendant in error contends that the Secretary's order should be revoked *because it illegally prevented his retirement*; while the

fact is that the order neither retired defendant in error nor prevented his retirement.

Neither did the Secretary's order "wholly retire" defendant in error from the service in violation of section 1455, R. S., as erroneously held by the court below. "Wholly retire" is synonymous with "discharge," but it carries with it certain benefits which are not incident to a discharge as ordinarily understood.

> What is it to be wholly retired from the service? It is nothing less than to be put out of the Army and out of office. (*Miller* v. *United States*, 19 Ct. Cls. 338, 353.)
>
> An officer on being wholly retired becomes a civilian. (*Miller* v. *United States*, 19 Ct. Cls. 338, 353.)
>
> If the statute should say "discharged" it would use a term applicable to enlisted men; if it should say "dismissed" it would use a term savoring of punishment and disgrace. The legislative draftsman therefore avoided these and used the curious euphemism "wholly retired." (*Emory* v. *United States*, 19 Ct. Cls. 254, 263.)

These citations from Melling's Laws Relating to the Navy sufficiently show that the orders issued in the present case did not "wholly retire" the defendant in error. He did not become a civilian by virtue thereof and has not been treated as such, but continued for the remainder of his enrollment to be a member of the Naval Reserve Force as

hereinbefore explained, the same as thousands of others who had been released from active duty.

The legal effect of the Bureau of Navigation's order *honorably discharging* the defendant in error *from active service in the Navy* was precisely what it was intended to be—that is, to release the defendant in error from active service in the Navy. The language of the Bureau of Navigation's order was not "honorably discharged from the Navy" or "honorably discharged from the Naval Reserve Force," but was "honorably discharged from *active service in the Navy.*" The language of the law (Act of August 29, 1916, 39 Stat. 588, 589) is:

> Enrolled members of the Naval Reserve Force may, in time of war or national emergency, be required to perform *active service in the Navy* throughout the war or until the national emergency ceases to exist.

The language of the Bureau of Navigation order followed the language of the statute. It discharged the defendant in error from "active service in the Navy," thereby restoring him for the remainder of his enrollment to his normal status as a member of the Naval Reserve Force, with all the rights, benefits, privileges, and liabilities incident to membership in that organization as hereinbefore recited in regard to the order of the Secretary. Neither the Secretary's order nor that issued by the Bureau of Navigation used the word "retired" or any word the legal equivalent thereof.

In his brief filed in the court below counsel for defendant in error vigorously attacked the legality of an order issued by the Secretary of the Navy under date of October 29, 1919, erroneously considering that order as having required that no disabled officers of the Naval Reserve Force should be retired, but that all such disabled officers should be "discharged without pay;" and in his brief he stated the question presented in this case to be, whether the Secretary of the Navy had the power in individual cases "to enforce that general order by personally discharging such officers from the Navy; and personally preventing their appearance before a retiring board."

The only provision in the order of October 29, 1919, which could possibly be construed as applying to defendant in error is as follows:

> 3. When the officer is an officer of the Naval Reserve Force or Marine Corps Reserve and is found by a board of medical survey to be unfit for further service, he shall be placed on inactive duty.

The effect of the order of October 29, 1919, as applied to any member of the Naval Reserve Force was precisely the same as that of the orders issued by the Secretary of the Navy and the Bureau of Navigation in the individual case of this defendant in error. In both instances members of the Naval Reserve Force were merely "released from active duty," "honorably discharged from active service in the Navy," or "placed on inactive duty," while

retaining during the remainder of their enrollment their normal status as members of the Naval Reserve Force not on active duty, but subject to recall to active duty, retirement, or discharge in accordance with law.

CONCLUSION.

Certainly the power has never been given the courts to annul military orders issued in the course of demobilization following cessation of hostilities in a war, by commanding the *Commander in Chief*, through his representative, the Secretary of the Navy, to cancel his orders releasing from active duty officers whose services are no longer required. Congress has never given such power to the courts, and it could not constitutionally do so, as the command of the Army and Navy is exclusively in the President, not subject to control by Congress or the courts.

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GEORGE MELLING,
Attorney, Office of the Judge Advocate General, Navy Department, of Counsel.

APRIL, 1923.

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Affirmed.

DENBY, SECRETARY OF THE NAVY OF THE UNITED STATES, *v.* BERRY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 47. Argued October 5, 1923.—Decided November 12, 1923.

1. The act establishing the Naval Reserve Force, (August 29, 1916,) impliedly empowered the President, at his discretion, or the Secretary of the Navy acting for him, to change the status of an officer of that force from active service in the Navy to the status of inactive duty. P. 32.
2. A mere change of status from active service, to inactive duty in the Naval Reserve Force, is not a retirement within the meaning of Rev. Stats., § 1455, which refers to officers in the Regular Navy, nor under the Acts of July 1, 1918, and June 4, 1920, which made that section applicable to officers on active service in the Reserve Force when disabled in the line of duty. P. 34.
3. An order of the Secretary of the Navy retiring an officer to inactive duty in the Naval Reserve Force being discretionary, the Secretary cannot be required by mandamus to revoke it, even though based on his erroneous belief that such officer was not entitled under the Acts of July 1, 1918, and June 4, 1920, to be retired on pay when disabled in line of duty. P. 36.
4. A naval regulation providing that when any officer on the active list becomes physically incapacitated to perform his duties, he will

be ordered before a retiring board (Nav. Reg. 1913, 331 [5]) did not bind the Secretary as a rule of law, under Rev. Stats., § 1547, after it was transferred to the instructions to naval retiring boards by order of the President. (Nav. Courts and Boards, 1917, § 679.) P. 37.

5. The right of a naval officer, disabled in the line of duty, to be retired on pay, is dependent by statute on the judgment of the President, not that of the courts; and the remedy of the officer when his application for a retirement board is disapproved by the Secretary, is by appeal directly to the President. (Nav. Ins. 1913, § 5323.) P. 38.

51 App. D. C. 335; 279 Fed. 317, reversed.

ERROR to a judgment of the Court of Appeals of the District of Columbia, which affirmed, in part, a mandamus issued by the Supreme Court of the District requiring the Secretary of the Navy to revoke an order directing the release of the relator, Berry, from active service in the Navy, and to make an order sending him before a retiring board, with a view to his retirement by the President.

Mr. George Ross Hull, with whom *Mr. Solicitor General Beck*, *Mr. Rufus S. Day*, Special Assistant to the Attorney General, and *Mr. George Melling* were on the brief, for plaintiff in error.

Mr. Daniel Thew Wright, with whom *Mr. Philip Ershler* was on the brief, for defendant in error.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This was a petition for mandamus filed in the Supreme Court of the District of Columbia by a member and officer of the Naval Reserve Force, as relator, to compel the Secretary of the Navy to revoke an order directing the release of the relator from active service in the Navy and to make an order sending him before a Retiring Board, with a view to his retirement by the President.

The Supreme Court sustained a demurrer to the amended answer of the Secretary and, the latter electing not to plead further, the court issued a mandamus as prayed. The Secretary carried the case on appeal to the Court of Appeals of the District, which affirmed the part of the mandamus directing revocation of the order of release and reversed the part requiring that the Secretary send the relator before a Retiring Board. The Secretary brings this writ of error to the judgment of the Court of Appeals. The case involves the construction of the general statutes of the United States applicable to the Naval Reserve Force and the retirement of its officers. We, therefore, have jurisdiction of the writ under § 250, par. 6, of the Judicial Code.

The relator, being an officer in the Naval Reserve Force, was ordered before a naval board of medical survey, and on October 14, 1919, was found by that board to be under permanent disability which was incurred in line of duty and was not the result of his own misconduct. The board recommended that the relator be sent before a retiring board. The Secretary of the Navy forwarded this recommendation to the Bureau of Navigation, the executive bureau of the Navy, disapproved, and directed that "this officer be ordered to proceed to his home and be released from active duty". The Bureau of Navigation, on November 17, 1919, accordingly issued to the relator this announcement: "You are hereby detached from such duty as may have been assigned you; you will proceed to your home and regard yourself honorably discharged from active service in the Navy". The relator wrote to the Secretary of the Navy requesting that his case be referred to a retiring board for consideration, to which the Secretary replied denying the plaintiff's right either to have his case so considered or to be placed on the retired list. The next day, November 18, 1919, this action was brought.

The Court of Appeals held that because the relator as Naval Reserve officer, if disabled in the line of duty, was eligible for retirement under the same conditions as provided for regular naval officers, and because no officer of the Navy could under § 1455, Rev. Stats. be retired from active service or wholly retired without a full and fair hearing before a navy retiring board if he should demand it, the Secretary had retired him from the service in violation of law and that he could be compelled to revoke his action. This would reinstate him to the status of a Naval Reserve officer in the active service with full pay as such from October 18, 1919.

The Naval Reserve Force was established by the Naval Appropriation Act of August 29, 1916, c. 417, 39 Stat. 556, 587. By its provisions, the Naval Reserve Force was to be composed of citizens of the United States who by enrollment therein or transfer thereto should obligate themselves to serve in the Navy in time of war or during an emergency declared by the President. Enrollment was to be for four years. A clothing gratuity was allowed and retainer pay of $12.00 a year or more according to class was to be paid to those who kept the Secretary advised of their whereabouts. The same grades and ranks were provided up to the rank of Lieutenant Commander as existed in the rank and file of the Navy. The President commissioned the commissioned officers. The Secretary issued warrants to the warrant officers. During peace or when no national emergency existed, members might be discharged at their own request on return of the clothing gratuity. Members might be ordered into active service in the Navy by the President in time of war or when in his opinion a national emergency existed, and might be required to perform such service throughout the war or until the national emergency ceased to exist. Enrolled members were to be subject to the laws, regulations and orders for the government of the regular Navy

only during such time as they might be required in the active service. The members of the Force when in active service were entitled to the same pay, allowance, gratuities and other emoluments as men of the same rank or grade in the regular Navy, but when on inactive duty they were entitled only to what was expressly provided in the act. The Secretary of the Navy was to make all necessary and proper regulations not inconsistent with law for the administration of these Naval Reserve Force provisions.

It is quite evident from the foregoing that members of this force occupied two statuses, one that of inactive duty, and the other of active service. It is further clear that it was within the power of the President, and of the Secretary of the Navy acting for him, to change the members of the Reserve Force from one status to the other. The power to call them from inactive duty to actual service was express. The power to order them from actual service to inactive duty was necessarily implied. How this should be done, was within the discretion of the President and his alter ego in the Navy Department, the Secretary. *United States* v. *Jones*, 18 How. 92, 95. The vesting of the right to make regulations to carry out the act in the Secretary shows that he was to act for the President. As a matter of practice in the Department, the method of calling out the members of the Reserve Force, and of sending them back to inactive duty, was by order of the Secretary of the Navy (Gen. Order No. 237 of October 6, 1916) left to the Bureau of Navigation, and under that Bureau mobilization and demobilization of the Reserve Force were carried on under special orders and circulars. Orders releasing individuals from active service and putting them on inactive duty were clearly within the power of the President and of the Secretary of the Navy acting for him in the administration of the

act. Nowhere is there found any limitation upon the discretion of the Executive in this regard. The orders in such cases were in the nature of military orders by the Commander-in-Chief in the assignment or withdrawal of available forces to or from duty for the good of the service. Such orders of withdrawal could not and did not make members of the Naval Reserve Force civilians. They did not release them from obligation under their enrollment to render active service again when ordered to do so by the proper authority. When the Bureau of Navigation detached relator from active duty and told him to go home and regard himself as honorably discharged from active service in the Navy, he was not ousted from the Naval Reserve Force or the Navy. The words "honorably discharged" were only to advise him and others that the change of his status from active to inactive duty was not because of his fault or misconduct.

The Court of Appeals, however, construed this order to be an effort to retire the relator from the Navy in the sense in which that term is used in § 1455, Rev. Stats., which reads as follows:

"No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Navy retiring-board, if he shall demand it, except in cases where he may be retired by the President at his own request, or on account of age or length of service, or on account of his failure to be recommended by an examining board for promotion."

This section was adopted in 1861 (c. 42, 12 Stat. 291,) and applied to regular officers in the Navy. The retirement from active service, and complete retirement provided in the section, are to be understood as they apply to such officers. Officers in the Regular Navy who have become unfit for service before the retiring age are subject to three methods of retirement. One is when the disability is in the line of duty and their retirement pay is

three-fourths of the pay of their rank on active duty. The other two are when the disability is not incurred in line of duty; and in one the retirement pay is furlough or one-half of leave of absence pay of their rank in active service, and in the other there is full retirement to civilian life on a year's full pay of their rank. §§ 1453, 1454, Rev. Stats. Section 1455 was enacted to prevent an abuse of the power of retirement by superior officers. Section 1455, Rev. Stats., has been made applicable to officers on active service in the Naval Reserve Force when disabled in line of duty, first by implication in a proviso of the Act of July 1, 1918, c. 114, 40 Stat. 704, 710, "that no member of the Naval Reserve Force shall be eligible for retirement other than for physical disability incurred in line of duty;" and then, after this suit was brought, by direct provision in Act of June 4, 1920, c. 228, 41 Stat. 834, as follows:

"That all officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty."

By Act approved July 12, 1921, c. 44, 42 Stat. 122, 140, the above was amended by adding a proviso as follows: "*Provided, however*, That application for such retirement shall be filed with the Secretary of the Navy not later than October 1, 1921." The proviso shows reflexively that Congress had always intended to give one entitled to retirement the right to apply for it.

To be retired from active service under the sections from 1448 to 1455, Rev. Stats., inclusive, means retired with pay and has had this meaning for many years. *Brown* v. *United States*, 113 U. S. 568, 572. To be wholly retired means to be removed from the service entirely on

payment of a lump sum and to become a civilian. *Miller v. United States*, 19 Ct. Clms. 338, 353; 29 Ops. Atty. Gen. 401. No form of retirement is a removal by way of punishment. Indeed, § 1456, Rev. Stats., expressly forbids retirement because of misconduct on account of which an officer may be sent before a court martial. It is very clear, therefore, that a mere change of status from active service to inactive duty in the Naval Reserve Force is not a "retirement" in the meaning of § 1455, Rev. Stats., the Act of July 1, 1918, or that of June 4, 1920.

There was no reason why, after the relator had been ordered to inactive duty in the Naval Reserve Force, he might not have applied for retirement under the provision of the Act of 1918, or later under the Act of June 4, 1920.

But it is said that the Secretary directed the release of the relator from active service and refused him a retiring board because he was of opinion that under the Act of July 1, 1918, and before the Act of June 4, 1920, Reserve Force officers were not entitled to be retired on pay, but that they must apply for the relief extended to persons disabled in the service by §§ 300 and 302 of the War Risk Insurance Act of October 6, 1917, c. 105, 40 Stat. 398, 405, 406. Because the Secretary gave a wrong reason for his action is not a ground for requiring him by mandamus to revoke the order putting the relator on inactive duty, if he had discretion to do this, as we have found he did have.

Nor was the Secretary of the Navy under obligation to order the relator before a retiring board because a board of medical survey recommended it.

Section 1448, Rev. Stats., provides that whenever an officer reports himself unable to perform his duties or whenever in the opinion of the President he is incapacitated, the President may in his discretion direct the Secretary of the Navy to refer the case to a Retiring Board. By the following sections, 1449 to 1454, the Board is to report its finding as to the incapacity of the officer, and,

if it exists, whether it was an incident of the service. The record is to be transmitted to the Secretary and by him laid before the President, whose approval is necessary to the retirement.

The mode of dealing with cases of disability is covered by the regulations of the Navy approved by the President to which the statute gives the force of law. § 1547, Rev. Stats. Naval Regulation 361 of 1913 gave authority to the commander-in-chief of a fleet, commandant of a station, or other commanding officer, to order a medical survey of any person in his command. Under Regulation 364 the Board of Survey of an officer was authorized to recommend treatment, or sick leave, but if the disability was deemed permanent, it might recommend that the officer be ordered before a Retiring Board. By Regulation 365 when a person surveyed was within the United States or the waters thereof, or in the Caribbean or adjacent waters, and was found unfit for duty, and the commanding officer approved the finding and recommendation of the Board as to what should be done, this was to be carried out "except in cases involving discharge, travel, leave, or retirement, which shall be referred to the department."

Regulation 331, sub-division 5, once provided:

"When any officer on the active list becomes physically incapacitated to perform the duties of his office, and the probable future duration of such incapacity is permanent or indefinite, he will immediately be ordered before a retiring board, and pending final action upon the question of his retirement will not be examined for promotion".

Counsel for the relator has maintained that the Secretary by reason of this regulation is under a statutory duty to order a retiring Board for an officer physically incapacitated and that he has no discretion in the matter. Its history and the abuse it was intended to stop, as well as § 1448, would make such a construction hard to sustain, but we need not go into this. It suffices to say that,

adopted in 1915, it has since lost its statutory force. By order of the President, dated January 14, 1916, it was stricken from the Navy Regulations and was thereafter embodied in instructions to Naval Retiring Boards. (Sec. 679, Naval Courts and Boards, 1917.) Even if it could have been construed as claimed when it had the effect of law, it could not now be made the basis of a proceeding in mandamus against the Secretary. It governs his subordinates only and may be ignored by him. *United States* v. *Burns*, 12 Wall. 246, 252; *Smith* v. *United States*, 24 Ct. Clms. 209. A board of medical survey is simply an executive instrumentality which the Secretary may use to obtain an expert opinion as to the physical capacity of an officer or man. Its recommendations involving retirement must always come to the Secretary for his approval. In the due course of business in the Navy Department applications for retirement dependent on disability must also come before the Secretary who, acting for and in aid of the President, makes preliminary inquiry into the need of ordering a retiring board. The statute does not require the President to direct the Secretary of the Navy to refer a case to a retiring board. It expressly puts it in the discretion of the President to do so or not to do so. It would be a curious inconsistency in the procedure if the Secretary were compelled by law to order a retiring board to consider an officer's case which the President is given discretion to grant or withhold.

But it is argued that an officer disabled in the line of his duty is by § 1455 entitled as of right to retirement on pay and that the courts should secure him that right. The right is one dependent by statute on the judgment of the President and not on that of the courts. If on the preliminary inquiry of the Secretary, he disapproves the application for a retiring board, the officer may appeal directly to the President for action on his petition. This opportunity was provided by section 5323, Naval Instructions, 1913, and would exist without it.

29 Syllabus.

For these reasons, we think that the demurrer to the answer should have been overruled.

Judgment reversed and the cause remanded for further proceedings.